Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1998

WISCONSIN CENTRAL LIMITED,

Petitioner,

-v-

BALTIMORE AND OHIO CHICAGO,
TERMINAL RAILROAD COMPANY,

Respondent.

and

CSX TRANSPORTATION INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in violation of the consistent holdings of this Court and other circuit courts of appeals that application of the filed rate doctrine cannot be varied by common law or equitable defenses, *e.g.*, *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998), *Accura Sys., Inc. v. Watkins Motor Lines, Inc.*, 98 F.3d 874 (5th Cir. 1996), *Sun City Taxpayers' Ass'n v. Citizens Utils. Co.*, 45 F.3d 58 (2d Cir. 1995), *cert. denied*, 574 U.S.1064 (1995), the Seventh Circuit improperly invoked waiver to preclude application of the filed rate doctrine in proceedings to enforce an arbitration award.

2. Whether in violation of the holdings of this Court in *W.R. Grace & Co. v. Local 759*, 461 U.S. 757 (1983) and *United Papermakers Int'l Union v. Misco*, 484 U.S. 29 (1987) that a court, and not an arbitrator, must ultimately decide whether enforcement of an arbitration decision would violate well-defined public policy, such as the filed rate doctrine, the Seventh Circuit improperly invoked waiver in refusing to consider the filed rate doctrine in proceedings to enforce an arbitration award.

LIST OF PARTIES AND AFFILIATES

The parties listed on the caption were the only parties to the proceedings below.

Pursuant to Supreme Court Rule 29.6, Wisconsin Central Ltd. declares that it is a wholly-owned subsidiary of Wisconsin Central Transportation Corporation, a publicly traded company, that owns an equity interest in Tranz Rail Holdings, Ltd. (New Zealand), a publicly traded company.

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Petitioner Wisconsin Central Ltd. ("WCL") petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Appendix to Petition for Writ of Certiorari ("App.") 1a-18a) is reported at 154 F.3d 404. The order of the court of appeals denying WCL's petition for rehearing with suggestions that rehearing be en banc (App. 75a) is unreported. The order of the United States District Court for the Northern District of Illinois dismissing WCL's claim under the filed rate doctrine, (App.37a-74a) is unreported. The order of the district court making its dismissal order a final and appealable order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (App. 19a-36a) is also unreported.

JURISDICTION

The order of the court of appeals denying WCL's petition for rehearing was entered on October 21, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are 49 U.S.C. §§ 10713 and 10761 (1993), which are reproduced at App. 77a.[1]

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[1]On January 1, 1996, the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the "Act"), became law. The Act repealed some provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10101 et seq. ("ICA"), and recodified the rest. Section 204(c)(1) of the Act provided that the Act was not to apply to suits, such as this one, commenced before the date of enactment. Thus, unless ex-

STATEMENT OF THE CASE

In this case, an arbitration panel determined that a rail carrier providing common carrier transportation service was entitled to recover charges for that service from its customer, another rail carrier, pursuant to a contract between the parties that had not been filed with the Interstate Commerce Commission ("ICC"). When the carrier sought to confirm and enforce the arbitration award pursuant to 9 U.S.C. § 9, the customer sought to defend on the ground that enforcement of the award would violate the filed rate doctrine and the strong public policy against discrimination embodied therein.

A Seventh Circuit panel held that the customer had waived its right to rely upon the filed rate doctrine because it had not raised the issue during the parties' arbitration proceeding. This holding is contrary to a century of uniform decisions of this Court and other circuit courts of appeals holding that the filed rate doctrine is not subject to common law and equitable defenses such as estoppel and waiver. *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990); *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998); *Accura Sys., Inc. v. Watkins Motor Lines, Inc.*, 98 F.3d 874 (5th Cir. 1996); *Sun City Taxpayers' Ass'n v. Citizens Utils. Co.*, 45 F.3d 58 (2d Cir. 1995), *cert denied*, 574 U.S. 1064 (1995). The Seventh Circuit holding is also contrary to the decisions of this Court and at least one other circuit court of appeals that whether enforcement of an arbitration award would violate a well-defined public policy, such as that

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pressly stated otherwise, all provisons of the ICA are referred to herein as they were prior to the Act. The provisions of Section 10761 of the ICA establishing the requirement of a filed rate applied at all relevant times during this dispute and, accordingly, were preserved as governing law pursuant to section 204(c)(1) of the Act.

embodied in the filed rate doctrine, is for a court, not an arbitrator, to decide. *See United Papermakers Int'l Union v. Misco*, 484 U.S. 29 (1987); *W.R. Grace & Co. v. Local 759*, 461 U.S. 757 (1983); *Seaboard Coast Line R. Co. v. National R. Passenger Corp.*, 554 F.2d 657 (5th Cir. 1977).

The dispute in this case involves three rail carriers: petitioner WCL, respondent CSX Transportation, Inc. ("CSX") and respondent Baltimore and Ohio Chicago Terminal Railroad Company ("BOCT"), a wholly-owned subsidiary of CSX. WCL and CSX are line haul carriers. They participate in hauling freight cars where the overall movement from shipper to consignee requires the participation of more than one carrier, and they share in the rate charged to the shipper.

In order for two line haul carriers to participate in a movement of cars, they must be able to interchange the cars with each other. If they cannot physically reach each other and engage in a direct interchange (either by using their own tracks or the tracks of other carriers), they can use the services of an intermediate switching carrier to effect interchange. The intermediate switching carrier picks up cars to be interchanged from one line haul carrier and delivers them to the other and, in return, receives as a fee an intermediate switching charge as prescribed by tariff on file with the ICC.

BOCT is an intermediate switching carrier. At all relevant times, BOCT has performed intermediate switching service in the Chicago area and for that service has charged an intermediate switching charge prescribed in its tariff on file with the ICC. On occasion, BOCT has also entered into agreements with line haul carriers specifying when BOCT will receive a switching charge and how much that charge will be.

On October 10, 1987, WCL, CSX and BOCT entered into an interchange agreement. The agreement provided that WCL was to deliver to BOCT at its Barr Yard cars destined for interchange to CSX. CSX, which operates its own trains into and out of Barr Yard, was to receive at the yard the cars delivered by WCL. The agreement also provided for WCL to deliver to BOCT cars destined for interchange to other line haul carriers and for BOCT to then deliver those cars to the other carriers.

The agreement contained a provision specifying the circumstances under which WCL would pay BOCT an intermediate switching charge for cars delivered. It also contained an arbitration clause requiring arbitration of "[a]ny irreconcilable dispute between the parties with respect to this agreement." The agreement was never filed with the ICC.

WCL began operations as a rail carrier the day after the agreement was entered into. Not long thereafter, a dispute arose as to whether WCL owed BOCT switching charges for cars delivered to Barr Yard for interchange to CSX. Several years later in 1993, after the amount of disputed charges had increased substantially, BOCT filed a complaint against WCL in the Northern District of Illinois seeking to recover the disputed charges. BOCT's claim was asserted under its tariff and invoked jurisdiction under 28 U.S.C. § 1337. Its complaint made no mention of the interchange agreement.

In its answer, WCL asserted as an affirmative defense that the interchange agreement provided for a direct interchange between WCL and CSX, with BOCT acting as CSX's agent, and not as an intermediate switching carrier, and that, as a result, BOCT was not entitled to recover any switching

charges since it did not perform any intermediate switching service. WCL also asserted several defenses under the ICA, including the three year statute of limitations under 49 U.S.C. § 11706.

In addition, WCL asserted a number of counterclaims against BOCT. One counterclaim alleged that BOCT had breached the interchange agreement and sought to recover damages. Several other counterclaims sought to recover damages for violations by BOCT of provisions of the ICA in connection with the interchange of cars destined to CSX (i.e., the same cars covered by BOCT's claim), including a claim that BOCT's tariff rate was unreasonable in violation of 49 U.S.C. § 10701a and a claim that BOCT had discriminated against WCL by charging it a higher switching charge than that charged to other line haul carriers in violation of 49 U.S.C. § 10741.

BOCT answered WCL's counterclaims by denying the existence of any interchange agreement. BOCT also asserted a number of affirmative defenses that would be applicable if an agreement were found to exist.

Several months later, BOCT reversed its position and was given leave by the district court to withdraw its answer denying the existence of the interchange agreement and to add a new claim to its complaint seeking to recover the disputed switching charges under the agreement. In addition, the district court granted BOCT's motion seeking a stay of further proceedings pursuant to 9 U.S.C. § 3 to allow arbitration of the parties' dispute under the agreement's arbitration provision. However, rather than staying the proceedings, the district court dismissed without prejudice BOCT's amended complaint and WCL's counterclaims. Recognizing that some

of the claims asserted were not arbitrable, the court gave each party leave to reinstate any non-arbitrable claims after completion of the arbitration if those claims were not mooted by the arbitration results.[2]

After the parties proceeded to arbitration, WCL sought to assert two of its ICA claims -- its claim of an unreasonable rate under 49 U.S.C. § 10701a and its claim of rate discrimination under 49 U.S.C. § 10741. BOCT opposed WCL, arguing that the ICA claims were not arbitrable. The arbitrators agreed with BOCT and refused to allow WCL to present its ICA claims.

On June 10, 1996, the arbitrators issued their award concluding that under the interchange agreement, WCL owed BOCT more than $17 million in switching charges for the CSX cars that WCL had delivered to Barr Yard. The arbitrators found that there was no direct interchange between WCL and CSX at Barr Yard under the agreement and that, as a result, BOCT performed intermediate switching service for the cars even though CSX received the cars at Barr Yard where WCL delivered them. The arbitrators rejected WCL's contention that the agreement provided for a direct interchange with BOCT handling the cars as CSX's agent, and not as an intermediate switching carrier.

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[2]The only claim that the district court specifically identified as being non-arbitrable was BOCT's claim to recover the disputed charges under its tariff. WCL interpreted the order as also including within the non-arbitrable claims other claims asserted under the ICA, an interpretation seemingly confirmed when the arbitrators refused to hear ICA claims. The Seventh Circuit panel disagreed with WCL's interpretation. App. 17a.

BOCT then filed a motion with the district court pursuant to 9 U.S.C § 9 seeking to confirm and have final judgment entered on the arbitration award. At the same time, WCL filed a motion to reinstate its previously asserted ICA counterclaims, including its claim of rate unreasonableness under 49 U.S.C. § 10701a and its claim of rate discrimination under 49 U.S.C. § 10741. As a result of the panel's interpretation of the agreement, WCL also sought to add a claim of unenforceability based upon the filed rate doctrine. Specifically, WCL alleged that the arbitrators had found that in return for switching services, WCL owed BOCT switching charges as provided in the agreement. WCL also alleged that because the agreement had not been filed with the ICC pursuant to 49 U.S.C. § 10713, BOCT could not recover switching charges under the agreement. WCL sought a declaratory judgment that based upon the filed rate doctrine, BOCT could recover switching charges, if at all, only under its filed tariff. Finally, WCL asked the district court to defer ruling on BOCT's motion to confirm until the court ruled on the merits of WCL's filed rate doctrine claim, arguing that if the court determined that the filed rate doctrine was applicable, BOCT would not be entitled to enforcement of the award.[3]

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[3]It is true as the Seventh Circuit panel noted, App. 2a, that the interchange agreement incorporated the amount of the switching charge specified in BOCT's tariff. As a result, any recovery of switching charges by BOCT, whether under the agreement or its tariff, would be based upon the same tariff rate. However, other differences aside, a claim by BOCT under its tariff would be subject to the three-year statute of limitation of 49 U.S.C. § 11706, as compared to the ten-year statute of limitations for breach of contract actions under Illinois law, 735 ILCS 5/13-206, thus eliminating a significant portion of BOCT's claim. By attempting to recover switching charges under the agreement, BOCT sought to recover substantially more than it would be entitled to recover pursuant to its tariff.

On January 29, 1997, the district court entered an order granting WCL leave to reinstate its rate unreasonableness and discrimination claims and referring those claims to the Surface Transportation Board.[4] App. 52a-53a, 70a. However, the court denied WCL leave to file its filed rate doctrine claim, holding that WCL had waived the filed rate doctrine issue by not submitting it to the arbitrators. App. 46a-52a. The district court also granted BOCT's motion to confirm, but withheld entry of judgment on the award pending a clarification of certain issues by the arbitrators. App. 57a-68a.

On August 28, 1997, after a supplemental award was issued by the arbitrators, the district court entered an order confirming the supplemental award and entering final judgment on both awards. App. 19a. The total amount of the judgment entered in favor of BOCT and against WCL was over $20 million. The court made that judgment, as well as its dismissal of WCL's filed rate doctrine claim, final and appealable pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. App. 35a.

On appeal, the Seventh Circuit affirmed the district court's dismissal of WCL's filed rate doctrine claim. The panel concluded that WCL's filed rate doctrine claim was a statutory claim and like other such claims was arbitrable. App. 12a-17a. The panel held that by failing to raise the filed rate doctrine issue with the arbitrators, WCL had waived its right to have the issue decided and was precluded from having

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[4]WCL's claims under 49 U.S.C. §§ 10701a and 10741 for rate unreasonableness and rate discrimination respectively are presently pending before the STB. The decision in the instant case may impact that proceeding.

a court decide the issue as a defense to enforcement of the arbitration award. App. 17a-18a.

REASONS FOR GRANTING THE PETITION

The reasons why the Court should grant the petition in this case are simple and straightforward. First, the decision of the Seventh Circuit is an unprecedented departure from the consistent holdings of this Court and other circuits concerning the strict application of the filed rate doctrine. Second, the Seventh Circuit holding is at odds with this Court and one other circuit court of appeals concerning the requirement that important matters of public policy in connection with enforcement of an arbitration award must be decided ultimately by a court and not an arbitrator.

1. The Seventh Circuit Decision Conflicts Squarely with the Consistent Application of the Filed Rate Doctrine by This Court and Other Circuit Courts of Appeals.

For nearly a century, the Court has consistently adhered to and applied the filed rate doctrine. The doctrine has been applied "across the spectrum of regulated utilities." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

In the rail industry, where the doctrine originated, the doctrine derived from the requirements of 49 U.S.C. § 10761, which required that a carrier providing common carrier transportation service file a tariff with the ICC specifying the rates to be charged for its service and which provided that a "carrier may not charge or receive a different compensation for that transportation or service than the rates specified in the tariff."

Under the doctrine, the carrier's filed rate is the "only lawful charge. Deviation from it is not permitted upon any pretext." *Louisville & N. R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915). A carrier and its customer cannot vary the carrier's compensation by contract. *Louisville & N. R. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924) ("No contract of the carrier could reduce the amount legally payable or release from liability a shipper who had assumed an obligation to pay the charges."); *Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156, 163 (1922) ("The rights as defined by the tariff cannot be varied or enlarged by either contract or tort . . . ."). Thus, a contract between a carrier and its customer allowing the carrier to recover either more or less than it would be entitled to under its tariff is unenforceable.[5]

The Court has vigilantly applied the filed rate doctrine because it serves to enforce an important Congressional policy -- the prevention of discrimination by a carrier. *Keogh*, 260 U.S. at 163 ("This stringent rule prevails, because otherwise the paramount purpose of Congress -- prevention of discrimination -- might be defeated."). Even though application of the doctrine may produce harsh or inequitable results in a particular case, the Court has never hesitated to apply the doctrine to prevent a carrier from recovering other than what it is entitled to pursuant to its tariff. *Maislin*, 497 U.S. at 128 ("Despite the harsh effects of the filed rate doctrine, we have consistently adhered to it.").

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[5]The Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895, created an exception to the filed rate doctrine by allowing carriers to enter into transportation contracts for carrier service that would govern in lieu of a tariff provided the contracts were properly filed with the ICC. 49 U.S.C. § 10713(a), (b)(1). In this case, it is undisputed that the parties' interchange agreement was never filed with the ICC.

As the Court has recognized, the doctrine cuts both ways. While the doctrine has most often been applied in an undercharge case where a carrier or its successor is seeking to recover additional amounts beyond those agreed to in a contract with its customer, the doctrine has also been applied to prevent a carrier from using a contract to recover more than it is entitled to under its tariff. *Security Services, Inc, v. K Mart Corp.* 511 U.S. 431, 440 (1994) ("While some may debate in other forums about the wisdom of the filed rate doctrine, it is enough to say here that the carriers cannot have it both ways."); *Hall*, 453 U.S. 571 (Seller of natural gas precluded under filed rate doctrine from recovering higher contract rates since rates were never filed with the FERC); *CSX Transp., Inc. v. City of Pensacola*, 887 F. Supp. 275, 279 (N.D. Fla. 1995) ("Just as a shipper may not assert equitable defenses to the collection of the tariff, a rail carrier should not be able to assert equitable legal claims to avoid strict compliance with a tariff it has formulated."), *reh'g. denied*, 936 F. Supp. 885 (N.D. Fla 1995).

While most of the filed rate doctrine cases the Court has considered have involved disputes between a carrier and a shipper, lower courts and the ICC have consistently held that the doctrine applies where the customer is not a shipper, but another carrier. *See, e.g., Cincinnati, N.O. & T.P. Ry. Co. v. Chesapeake & O. Ry. Co.*, 441 F.2d 483, 487-488 (4th Cir. 1971); *Illinois Term. R. Co. Abandonment*, 328 I.C.C. 49, 61 (1965), *aff'd*, 328 I.C.C. 66 (1966).

Finally, because of the importance of the doctrine and the underlying Congressional policy of preventing discrimination, the Court has consistently held that common law and equitable defenses are not available to prevent application of the filed rate doctrine. *Maislin*, 497 U.S. at 127 ("this Court has

read the statute to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff."); *Pittsburgh, C.,C. & St. L. R. Co. v. Fink*, 250 U.S. 577, 582-83 (1919) ("Nor can the defendant in error successfully invoke the principle of estoppel against the right to collect the legal rate."). Indeed, as the Court has held, there is literally nothing, with the exception of the statute of limitations, that a carrier or its customer can do that will prevent the tariff from being applied. *Central Iron & Coal*, 265 U.S. at 65 ("Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor"). Even intentional misstatement of a published rate cannot preclude application of the filed rate doctrine. *Kansas City Southern Ry. Co. v. Carl*, 227 U.S. 639, 653 (1913).

Other circuit courts of appeals have been consistent in adhering to the strict requirements of the filed rate doctrine as announced by the Court. *Accura Sys., Inc. v. Watkins Motor Lines Inc.*, 98 F.3d 874, 880-81 (5th Cir. 1996) (recoupment claim not permitted as a defense to filed rate as "no other authority to support the assertion of an equitable defense to a freight charge recovery action."); *Marcus v. AT&T Corp.*, 138 F.3d 46, 58-60 (2d Cir. 1998) (filed rate doctrine precludes claims for fraud, false advertising, and negligent misrepresentation since "[a]pplication of the filed rate doctrine in any particular case is not determined by the culpability of the defendant's conduct or the possibility of inequitable results."); *accord Fax Telecommunicaciones Inc. v. AT&T*, 138 F.3d 479, 488-90 (2d Cir. 1998). The Seventh Circuit's decision even conflicts with its own prior rulings applying the filed rate doctrine. *Gross Common Carrier, Inc. v. Baxter Healthcare Corp.*, 51 F. 3d 703 (7th Cir. 1995); *Norwest Transp., Inc. v. Horn's Poultry, Inc.*, 23 F.3d 1151 (7th Cir. 1994), *reh'g.*

denied, 37 F.3d 1237 (7th Cir.1994), *cert. denied*, 514 U.S. 1004 (1995); and *Western Transp. Co. v. Wilson and Co., Inc.*, 682 F.2d 1227, 1231 (7th Cir. 1982) ("But Congress did not create a flexible standard [in the filed rate doctrine] for courts to apply in accordance with the facts, equities and economic realities of the particular case. It forbade carriers to receive any different compensation from the rate in the applicable tariff.").

In this case, the arbitrators awarded BOCT charges for intermediate switching service, a common carrier service, based only upon the parties' interchange agreement. The panel considered no ICA issues, refusing to hear issues of rate reasonableness and rate discrimination that WCL expressly tendered. Because of the difference in the applicable statutes of limitations governing a contract award and a tariff award, the amount awarded under the contract was substantially more than BOCT would have been entitled to had it been limited to recovery pursuant to its tariff.[6] When BOCT sought to enforce the award, WCL raised the filed rate doctrine as a defense. The Seventh Circuit panel held that WCL had waived its right to rely upon the filed rate doctrine by not raising the issue during arbitration.

Waiver, however, like estoppel, is an equitable defense. *In re Air Crash Disaster at Sioux City, Iowa*, 259 Ill. App. 3d 231, 241, 631 N.E.2d 1302, 1310 (1994) ("[W]aiver is an equitable doctrine invoked to further the interests of justice."), *appeal denied*, 157 Ill. 2d 501, 642 N.E.2d 1280 (1994); *Illinois Rockford Corp.v. Dickman*, 167 Ill. App. 3d

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[6]Under state law, a contract claim is governed by a ten year statute of limitations; a tariff claim under federal law is restricted by a three year limitations period. App. 2a-3a. *See* note 3, *supra*.

113, 119, 520 N.E.2d 1184, 1187 (1988) ("Waiver and estoppel are two separate equitable defenses."), *appeal denied*, 122 Ill. 2d 575, 530 N.E.2d 246 (1988). By invoking waiver to preclude the filed rate doctrine defense, the Seventh Circuit's opinion conflicts directly with this Court's decisions and other courts of appeals decisions consistently holding that equitable and legal defenses cannot be used to prevent application of the filed rate doctrine.[7]

In its opinion, the Seventh Circuit justified its deviation from this Court's prior decisions by attempting to distinguish between a waiver occurring during the parties' contractual or commercial dealings, which the Seventh Circuit held was covered by the Court's prior decisions, and a "procedural waiver," which the Seventh Circuit held was not. App. 18a. This Court, though, has never recognized such a distinction in applying the filed rate doctrine. Other courts and the ICC, moreover, have rejected such a distinction. For example, in *Chicago, B.&Q. R. Co. v. Ready Mixed Concrete Co.*, 487 F.2d 1263 (8th Cir. 1973), a carrier and a shipper had settled litigation over the reasonableness of the carrier's rate by entering into a stipulation to dismiss pursuant to which the carrier agreed to accept a rate less than its tariff rate. The Eighth Circuit concluded that a defense of waiver could not be applied when the carrier later sought to collect its tariff

[7] The Seventh Circuit's decision is also at odds with the decision of the Court of Appeals for the District of Columbia which has narrowly interpreted the Federal Energy Regulatory Commission's statutorily based power to waive certain tariff requirements in order not to conflict with the strict requirements of the filed rate doctrine. *Columbia Gas Transmission Corp. v. Federal Energy Regulatory Comm'n*, 895 F.2d 791 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 907 (1990).

rate, even though the waiver was based upon a stipulation filed with the court:

> Under the statute courts may not permit the tariff to be changed or waived whether it be by agreement of the parties, failure to carry out that agreement or even by stipulation in court. 487 F.2d at 1267-68.

See also Thomson Phosphate Co. v. Atlantic Coast Line R. Co., 332 I.C.C. 641, 644 (1968).

Further, even if the distinction drawn by the Seventh Circuit were valid, it would not justify a finding of waiver in this case. The waiver imposed by the Seventh Circuit on WCL did not arise because of its conduct during the course of a lawsuit or as a result of a failure to invoke or follow some statute or rule. Waiver was imposed because of WCL's conduct during its performance under the parties' interchange agreement, specifically its conduct in performing its contractual duty to arbitrate. Arbitration is a creature of contract: whether a party has to arbitrate, what issues have to be arbitrated, the procedures to be followed in the arbitration and whether the award is binding or not are all subjects of the parties' contract. What a party does during an arbitration -- whether it raises an issue or not -- is essentially a question of the party performing its contractual obligations.

Consequently, by holding that WCL had waived the filed rate doctrine because it did not raise the issue during arbitration, the Seventh Circuit was imposing a waiver based upon the parties' contractual dealings. This, of course, is the very type of waiver that the Seventh Circuit itself said was covered by the Court's prior decisions holding that equitable

defenses cannot be used to defeat application of the filed rate doctrine.

In justifying invocation of waiver, the Seventh Circuit suggested that to do otherwise would permit a litigant, such as WCL, to assert a filed rate claim even after a failure to file a notice of appeal, citing *West Coast Truck Lines, Inc. v. American Indus., Inc.*, 893 F.2d 229, 234 (9th Cir. 1990). But precisely the contrary is true. The Seventh Circuit invoked a common law equitable defense, waiver, to defeat a clear Congressionally mandated and judicially upheld doctrine -- the filed rate requirement. WCL did not wait beyond the expiration of any statutory appeals period, as in *West Coast*, but timely raised the defense in response to BOCT's motion to enforce and timely filed the filed rate claim under terms of the district court's dismissal with leave to reinstate.

Finally, however the Seventh Circuit has styled its action, it has generated a new doctrine inconsistent with this Court's prior filed rate holdings. The Seventh Circuit has crafted an unprecedented judicial exception to the strict requirements of the filed rate doctrine. In *Maislin*, this Court refused to permit the ICC, in the exercise of its expert rulemaking authority, to craft a reasonable exception to the filed rate doctrine. If the agency to whom Congress had given primary jurisdiction was not allowed for good reason to vary the strict requirements of the filed rate doctrine, even less so should this Court tolerate the attempt of the Seventh Circuit to generate its own equitable exception.

2. The Seventh Circuit's Decision Conflicts with the Rulings of This Court that Important Matters of Public Policy in Enforcement Of Arbitration Awards Must Ultimately Be Decided by a Court and Not an Arbitrator

In its opinion, the Seventh Circuit held that the filed rate doctrine issue that WCL sought to raise was arbitrable under the interchange agreement's arbitration clause. In reaching this conclusion, the court relied upon decisions of this Court such as *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) holding that claims arising under federal statutes are arbitrable. App. 13a. Based upon these decisions, the Seventh Circuit concluded that if a party, such as WCL, had a claim based upon the filed rate doctrine, the proper place, and indeed the only place, to litigate the merits of the claim was in arbitration.

The Seventh Circuit's reasoning, however, was flawed and conflicts with the prior decisions of the Court. The decisions of the Court that the Seventh Circuit relied upon do hold that depending upon the scope of the applicable arbitration clause, a party's claim for relief under a statute is arbitrable. Here, though, WCL was not asserting any claim for relief. Although technically pled as a claim for declaratory judgment, WCL raised the filed rate doctrine as a defense. Further, WCL asserted the filed rate doctrine not as a defense to BOCT's claim, but as a defense to enforcement of the arbitrators' award which first interpreted the parties' agreement as entitling BOCT to recover intermediate switching charges for a common carrier service to which the filed rate doctrine is applicable.

In *Misco*, 484 U.S. 29 (1987) and *W.R. Grace*, 461 U.S. 757 (1983), this Court concluded that a party could defend against enforcement of an arbitration award by showing that enforcement of the award would violate public policy. In *Misco*, 484 U.S. at 42, the Court explained the reason for this rule:

> A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. (Citations omitted). That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.

Furthermore, in both cases, the Court held that the issue of whether enforcement of an award violates public policy is for a court, and not for the arbitrators to decide. Thus, as the Court stated in *W.R. Grace*, 461 U.S. at 766:

> [The arbitrator's] view of his own jurisdiction precluded his consideration of this question, and, in any event, the question of public policy is ultimately one for resolution by the courts.

See also Misco, 489 U.S. at 43 (same).

In this case, the arbitrators' award interpreted the parties' agreement as entitling BOCT to recover switching charges from WCL. BOCT sought to enforce the award and use the district court to recover the charges awarded. As already noted, the filed rate doctrine reflects a strong Congressional policy -- a policy deemed sufficiently important that this Court has refused to allow common law and equitable defenses to be used to block application of the filed rate doctrine. Thus, WCL's filed rate doctrine defense was a public policy defense, a defense which under *W.R. Grace* and *Misco*, WCL was entitled to have heard on the merits by the district court.

The Seventh Circuit's opinion also conflicts with the Fifth Circuit's decision in *Seaboard Coast Line R. Co. v. National R. Passenger Corp.*, 554 F.2d 657 (5th Cir. 1977). In that case, Seaboard sought to recover compensation for services provided to Amtrak under a service agreement. The amount sought by Seaboard was based upon its tariff. Amtrak claimed that the compensation due Seaboard was limited to what was provided for in the parties' agreement and invoked arbitration to determine whether the rates provided for in the agreement were applicable to the services that had been provided. Seaboard opposed arbitration arguing, inter alia, that even if the rates in the agreement were found by the arbitrator to be applicable, the filed rate doctrine would preclude application of anything other than the tariff rates. The Fifth Circuit rejected Seaboard's argument and ordered it to arbitrate. As for Seaboard's filed rate doctrine defense, the court concluded that Seaboard could "raise the statutory claim as a defense to enforcement of the arbitration award." 554 F.2d at 661. In other words, the appropriate place for invoking the

filed rate doctrine was as a defense to enforcement of any arbitration award.[8]

In other circumstances involving enforcement of an arbitration award, the Seventh Circuit itself has elected to review and rule upon a defense involving public policy issues even though that defense had not been presented to or argued before the arbitration panel. *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1196, 1199 (7th Cir. 1987) (court reviewed and ruled upon the validity of a no-contest clause in a copyright licensing agreement even though the issue was not presented as a defense during arbitration). The Seventh Circuit's invocation of waiver in this instance to avoid ruling on the filed rate doctrine cannot be reconciled with its earlier holding in *Rumbleseat.*

3. Continued National Importance of Filed Rate Doctrine

It is true that the filed rate doctrine has largely been modified with respect to the railroad and motor carrier industries by the ICC Termination Act. However, the doctrine remains integral in a number of other industries including the telecommunications, natural gas and electric industries. *See, e.g., Cahnman v. Sprint Corp.*, 133 F.3d 484, 489 (7th Cir. 1998); *Sun City Taxpayers Ass'n v. Citizens Utils. Co.*, 45 F.3d 58, 62 (2d Cir. 1995), *cert. denied,* 574 U.S. 1064 (1995); *Taffett v. Southern Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992), *cert. denied,* 506 U.S. 1021 (1992); *Town of Norwood v. New England Power Co.*, 23 F. Supp. 2d 109, 115-116 n.6 (D. Mass. 1998). Moreover, with the increasing

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[8]In *In re American Freight Sys., Inc.*, 164 B.R. 341 (D. Kan. 1994), the district court also concluded that it is for a court, and not an arbitrator, to decide whether the filed rate doctrine bars recovery of charges under an agreement.

use of arbitration as a dispute resolution mechanism, the issue presented by this case -- the interplay between arbitration and the filed rate doctrine -- remains an important issue, an issue that the Court can and should resolve by granting the Petition.

More broadly and of national importance, this petition squarely presents the issue of whether, contrary to all the holdings of this Court, there will be circumstances where waiver or other equitable defenses will be allowed to defeat the application of the filed rate doctrine. The fact that the Seventh Circuit elected to disregard nearly one hundred years of filed rate doctrine precedent in the transportation industry cannot be ignored. The application of the filed rate doctrine is a nationally important issue in regulated industries and the Seventh Circuit's opinion has now created a new controversy over its application.

CONCLUSION

The petition for a writ of certiorari should be granted, and this Court should set the case for briefing and argument.

January 19,1999

Respectfully submitted,

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APPENDIX

Appendix A
No. 97-3484

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BALTIMORE AND OHIO CHICAGO, TERMINAL RAILROAD COMPANY,

v.

WISCONSIN CENTRAL LIMITED

May 14, 1998, Argued
August 25, 1998, Decided

COUNSEL: For BALTIMORE AND OHIO CHICAGO, TERMINAL RAILROAD COMPANY, Plaintiff - Appellee: Paul V. Esposito, Douglas A. Lindsay, LEWIS, OVERBECK & FURMAN, Chicago, IL USA. Thomas M. Weithers, CENTRAL STATES LAW DEPARTMENT, Des Plaines, IL USA.

For WISCONSIN CENTRAL LIMITED, Defendant - Appellant: James A. Fletcher, OPPENHEIMER, WOLFF & DONNELLY, Chicago, IL USA. Janet H. Gilbert, WISCONSIN CENTRAL LIMITED.

JUDGES: Before Posner, Chief Judge, and Cummings and Bauer, Circuit Judges.

OPINION BY: POSNER

OPINION: Posner, Chief Judge. This procedurally complicated lawsuit between two railroads began five years ago when BOCT filed its complaint in federal district court under the Interstate Commerce Act, demanding that WCL, to which BOCT had rendered terminal services, pay it switching charges and railroad-car rental fees pursuant to a tariff for such services that BOCT had filed with the Interstate Commerce Commission. In its answer, WCL claimed both that BOCT's claim was barred by an agreement between the parties covering the services BOCT had rendered (an interchange agreement) and that the rate in the tariff that BOCT was suing on was unreasonable and discriminatory. When shortly afterward the parties appeared before the district judge to report on the status of the case, they agreed to mediation; it failed, and BOCT, which in response to WCL's answer had denied that there was an enforceable interchange agreement, now moved to amend its complaint to add a claim of breach of contract based on the agreement and for a stay of proceedings pending arbitration of its contractual rights. The Interstate Commerce Act permits railroads to deal with their customers (which can include another railroad) either by tariffs, which are publicly announced take-it-or-leave-it form contracts, or by individually negotiated agreements. 49 U.S.C. §§ 10713, 10761 (1994 ed.); Burlington Northern Ry. v. STB, 316 U.S. App. D.C. 103, 75 F.3d 685, 687 (D.C. Cir. 1996); National Grain & Feed Ass'n v. United States, 5 F.3d 306, 309 (8th Cir. 1993). Because the interchange agreement incorporated the rates in the tariff that BOCT was also suing on, there were only two pertinent differences between BOCT's tariff claim--its original claim--and the contract claim based on the interchange agreement that it wanted to add by amending its complaint. First, the statute of limitations was ten

years for the contract claim and only three years for the tariff claim (a feature of the agreement that favored BOCT). Second, there was a discrepancy between the description of the covered services in the tariff and in the agreement that WCL believed would preclude BOCT from seeking payment if the agreement trumps the tariff.

The ground on which BOCT asked for a stay pending arbitration of the contract claim was a clause in the interchange agreement requiring the parties to arbitrate any "irreconcilable disputes" arising under it. WCL opposed both the request for the stay, and the motion to amend the complaint, on the ground of undue delay. The judge disagreed with WCL's position, granted the motion to amend the complaint, but rather than staying the suit pending arbitration dismissed it in its entirety, though without prejudice to either party's reinstating any nonarbitrable claim or defense within thirty days after the arbitrators made their award. Yet while dismissing the suit, the judge purported to retain jurisdiction to confirm the award.

The parties proceeded to arbitration, which eventuated in an award to BOCT of some $ 20 million in damages (including interest) for breach of the interchange agreement. BOCT moved the district court to confirm the award and WCL moved to reinstate its defenses. The judge confirmed the award. He refused to reinstate two of the defenses on the ground that WCL had waived them by failing to present them to the arbitrators. He reinstated others but referred those to the Surface Transportation Board (successor to the Interstate Commerce Commission, which was abolished in 1996) in accordance with the doctrine of primary jurisdiction. The referred defenses are that

BOCT's tariff violates the Interstate Commerce Act because it is unreasonable and discriminatory as applied to the services that BOCT rendered to WCL. The principal defense that the judge refused to reinstate (the other needn't be discussed) was that BOCT could not recover damages under the interchange agreement because of the filed-tariff doctrine, of which more anon. "Reinstatement" is a misnomer as applied to this defense, for WCL had never pleaded it before. Remember that WCL had originally sought to use the interchange agreement as a shield against BOCT's tariff claim, and it could hardly do so by arguing that the tariff preempted the agreement. It was a new defense, and the judge thought it should have been presented to the arbitrators. "Defense" is a misnomer too, because a claim that a tariff is invalid, when the claim is interposed in a suit by a carrier to collect the tariff charge, is technically a counterclaim. Reiter v. Cooper, 507 U.S. 258, 263, 122 L. Ed. 2d 604, 113 S. Ct. 1213 (1993). The distinction is a fine one, but it has bite, as we shall see.

It may seem odd that the district judge should have referred the challenge to the validity of the tariff to the STB while confirming the arbitrators' award. One might think that the award would moot BOCT's tariff claim by giving BOCT more than it could get under the tariff for the identical services covered by the board. Why, then, having confirmed the award, didn't the judge dismiss the rest of the suit? Because the arbitrators' award, and the district judge's order confirming it, was premised on the yet-to-be-determined validity of the tariff incorporated in the interchange agreement. If the STB determines the tariff to be invalid, WCL will have a claim against BOCT, enforceable in this lawsuit, for the return of part or all the arbitration award.

The judge certified his order confirming the arbitrators' award for an immediate appeal to us under Fed. R. Civ. P. 54(b) as a partial final judgment. This was a proper application of the rule, which authorizes the entry of a final, appealable judgment on a separate claim if there is no good reason to delay the appeal until the end of the entire litigation. The part of the case that remains in the district court, though stayed there pending consideration by the Surface Transportation Board, is WCL's claim that the tariff is invalid. The part of the case that the judge resolved is BOCT's contract claim. These are, believe it or not, separate claims. WCL's appeal does not challenge the arbitrators' interpretation of the agreement, but only the propriety of the judge's having referred the case to arbitration in light of BOCT's failure to request arbitration at the outset, and of his having deemed WCL's defense, based on the filed-tariff doctrine, to BOCT's contract claim waived because it could have been presented to the arbitrators. These entirely procedural issues do not overlap any of the issues in the STB proceedings, and so the resolved and retained claims are rightly regarded as separate claims within the meaning of Rule 54(b). See Lawyers Title Ins. Corp. v. Dearborn Title Corp., 118 F.3d 1157, 1162 (7th Cir. 1997), and cases cited there.

It is true that the arbitration award and so the order confirming it may as a practical matter be undone by the STB. But WCL's "defense" that the BOCT tariff is invalid is a counterclaim, and as such it can be treated as a separate claim for Rule 54(b) purposes, Reiter v. Cooper, 507 U.S. 258, 265, 122 L. Ed. 2d 604, 113 S. Ct. 1213 (1993); see also Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 9, 64 L. Ed. 2d 1, 100

S. Ct. 1460 (1980), provided that it is distinct in the sense of having only a minimum factual overlap with the plaintiff's claim. More than a technicality underlies this conclusion. The arbitration award is "conditional" in the loose sense that WCL may eventually get its money back, but it is as an unconditional order to pay. The Interstate Commerce Act displays its solicitude for carriers by creating a mechanism by which their customers may be required to pay first and recoup later. This structure sets the stage for the use of Rule 54(b) illustrated by this case, as by Reiter. See also In re Lifschultz Fast Freight Corp., 63 F.3d 621, 624 (7th Cir. 1995); Hargrave v. Freight Distribution Service, Inc., 53 F.3d 1019, 1021 (9th Cir. 1995).

That is one jurisdictional issue out of the way but there is another: whether the district judge had jurisdiction over the case when it came back to him after the arbitration. There is no doubt that he had [*8] jurisdiction over it when it was originally filed and that he was empowered by the Federal Arbitration Act to stay it pending arbitration. 9 U.S.C. § 3. The issuance of a stay, as distinct from an order of dismissal, implies that the proceeding in the court that issued the stay remains on the court's docket, albeit in a state of suspended animation. As long as the case remains before the court, the judge has the power to issue any order that is within his power to issue in a case of that sort. And that includes an order confirming an arbitration award when, as in this case, the agreement pursuant to which the parties' dispute (or some part of it) is being arbitrated is within the compass of the Federal Arbitration Act. See Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 275-76, 76 L. Ed. 282, 52 S. Ct. 166 (1932); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer, 49 F.3d 323, 329-30 (7th Cir. 1995);

University Life Ins. Co. v. Unimarc Ltd., 699 F.2d 846, 850 (7th Cir. 1983); Prudential-Bache Securities, Inc. v. Fitch, 966 F.2d 981, 989 (5th Cir. 1992); Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698, 705 (2d Cir. 1985).

The only thing that obscures this principle in the present case is the judge's action in dismissing the parties' claims while retaining jurisdiction to confirm the award. He should not have dismissed BOCT's claim, since if BOCT failed in the arbitration to obtain all the relief it was seeking it would want to proceed under the Interstate Commerce Act, the original and neverabandoned basis of its original complaint. But remember that the judge dismissed BOCT's claim (and WCL's defenses) with leave to reinstate; and if there is a practical difference between such a disposition--especially when coupled with a purported retention of jurisdiction--and a stay, we can't find it. A dismissal with leave to reinstate is not appealable as a final order, as an ordinary dismissal would be and most stays would not be. Otis v. City of Chicago, 29 F.3d 1159, 1163 (7th Cir. 1994); Brill v. McDonald's Corp., 28 F.3d 633, 634 (7th Cir. 1994). In other words, we treat a dismissal with leave to reinstate as if it were a stay. And so in this case, too, we shall look behind labels, construe "reinstate" to mean "reactivate," Richmond v. Chater, 94 F.3d 263, 268 (7th Cir. 1996), and so interpret the district court's order as a stay rather than a dismissal. And this means that we won't have to consider the esoteric question tendered by the parties of whether the judge's order reinstating some of WCL's defenses enabled him to confirm the arbitrators' award in the exercise of his supplemental jurisdiction. 28 U.S.C. § 1367. But once again we urge district judges to eschew dismissals with leave to reinstate. See Otis v. City of

Chicago, supra, 29 F.3d at 1163; Adams v. Lever Bros. Co., 874 F.2d 393, 395-96 (7th Cir. 1989); Ohio River Co. v. Carrillo, 754 F.2d 236, 238-39 (7th Cir. 1985) (per curiam). This case is a further illustration that it is a confusing form of judgment.

We now consider whether the judge erred in allowing BOCT to demand arbitration as late as it did. The general rule is that a demand for arbitration, like the invocation of a forum selection clause or any other claim of improper venue, Sharpe v. Jefferson Distributing Co., 148 F.3d 676, 1998 U.S. App. LEXIS 11724, 1998 WL 312754 at *3 (7th Cir. 1998); Frietsch v. Refco, Inc., 56 F.3d 825, 830 (7th Cir. 1995), must be made as early as possible so that the other party can know in what forum he has to proceed. Cabinetree of Wisconsin Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 391 (7th Cir. 1995). But like other rules of venue it is not a rule limiting the subject-matter jurisdiction of the court, so if there is a good reason for delay the district judge can excuse noncompliance with the rule. Cabinetree of Wisconsin Inc. v. Kraftmaid Cabinetry, Inc., supra, 50 F.3d at 390-91; St. Mary's Medical Center v. Disco Aluminum Products Co., 969 F.2d 585, 589 (7th Cir. 1992); Gilmore v. Shearson/American Express, Inc., 811 F.2d 108, 113 (2d Cir. 1987). And we'll reverse only if the judge has acted unreasonably in doing so. Cabinetree of Wisconsin Inc. v. Kraftmaid Cabinetry, Inc., supra, 50 F.3d at 390; St. Mary's Medical Center v. Disco Aluminum Products Inc., supra, 969 F.2d at 588-89; contra, Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 25 (2d Cir. 1995) (holding that the judge's determination is to be reviewed de novo).

We cannot quite say that the judge was unreasonable. BOCT was entitled to elect in filing its original complaint to proceed under the Interstate Commerce Act rather than under the interchange agreement. A plaintiff is not required to invoke every theory of recovery that may be available to him, although he runs the risk of forfeiting an omitted theory by operation of waiver, res judicata, or other defenses. The interchange agreement consisted of an exchange of documents with no final, signed contract, and although it was plausible that the exchange was sufficiently final and definite to constitute a legally enforceable contract, this was by no means certain and BOCT could reasonably believe that breach of contract was an infirm basis for seeking millions of dollars in back charges and fees from WCL. Even if it were an otherwise enforceable contract, moreover, it might be preempted by the tariff, as we shall see. And it contained some language that favored WCL by defining the services covered by the agreement so narrowly as possibly to exclude the services that BOCT had rendered and was trying to get paid for. But then WCL--in hindsight mistakenly, indeed disastrously, for in the arbitration BOCT obtained far greater damages than it could have obtained under the tariff with its shorter statute of limitations--injected the contract into the case. BOCT had now to reconsider its options--and not in the sense, deprecated in Cabinetree, in which a party delays invoking arbitration until it senses that the litigation in court is not going well for it. It had to do so promptly, however. Sharpe v. Jefferson Distributing Co., supra, 1998 WL 312754 at *3. Yet its immediate response--the lawyer's natural reflex to an opponent's claim--the position that it took in its response to WCL's answer, was to deny that the agreement was enforceable. Mediation efforts ensued and it was when they failed that BOCT

changed its position, decided the agreement was enforceable, and invoked the arbitration clause.

When it did this, no discovery had yet been taken in the suit, no signals pro or con BOCT's position had been emitted by the district judge, and WCL had suffered no harm from BOCT's delay in requesting arbitration. None of these factors is determinative, however, not even absence of harm. Cabinetree of Wisconsin Inc. v. Kraftmaid Cabinetry, Inc., supra, 50 F.3d at 390; see also St. Mary's Medical Center v. Disco Aluminum Products Inc., supra, 969 F.2d at 590. Courts have an independent interest in keeping a suit so far as possible in one place rather than letting it bounce around from court to arbitrator to court. The Second Circuit, it is true, has held in two recent cases that without proof of harm a delay in invoking [*14] arbitration is irrelevant. Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., supra, 67 F.3d at 25; PPG Industries, Inc. v. Webster Auto Parts, Inc., 128 F.3d 103, 108 (2d Cir. 1997). But in neither case did the court refer to our contrary decisions and the only reason it gave for its result was the existence of a policy of favoring resort to arbitration as a means of settling disputes. The strength it ascribes to that policy probably explains as well the other holding of Leadertex, that a refusal, because of delay, to enforce an arbitration clause is reviewable by the appellate court de novo.

One might have supposed that the only policy in play would be that of giving effect to parties' contractual choices, which sometimes include arbitration. That has indeed been authoritatively described as the principal goal of the Federal Arbitration Act, which repudiated the traditional judicial hostility

to enforcing arbitration awards. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-21, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985). The cases also speak, however, of wanting affirmatively to encourage people to agree to resolve their legal disputes by arbitration; but at least as far as commercial as distinct from labor arbitration is concerned, the reason for this extracontractual affection for arbitration is to lighten the pressure on the courts. National Union Fire Ins. Co. v. Belco Petroleum Corp., 88 F.3d 129, 133 (2d Cir. 1996). This reason is not well served by allowing a party to elect arbitration when he has allowed the case to proceed in court until he makes a tactical decision that he might do better before an arbitrator.

But here the tactical decision was precipitated by the opponent, which injected the contract with its arbitration clause into the case. It is true that BOCT wasn't quick off the mark, and didn't just add a claim but flip-flopped, having previously denied the enforceability of the agreement on which it based the new claim. Another district judge might reasonably have found that BOCT indeed waited too long. But considering the lack of harm, the lack of activity in the court proceedings, and the absence of any discreditable tactical motive for the belated invocation of arbitration, we cannot say that Judge Hart was unreasonable in allowing BOCT to invoke the arbitration clause.

This bring us to the question whether the judge was right to hold that WCL had waived its filed tariff defense to the breach of contract claim by failing to present it to the arbitrators. WCL makes three arguments. The first is that a claim under the filed-tariff doctrine is not arbitrable, though it is plainly

within the scope of the arbitration clause in the interchange agreement. The clause requires arbitration of all irreconcilable disputes arising out of the agreement, and all includes the dispute over whether BOCT's reliance on the agreement as a basis for seeking the recovery of its switching charges and car-rental fees was blocked by the filed-tariff doctrine. The doctrine (now drastically curtailed in the railroad industry, see 49 U.S.C. § 13702(a)) requires a common carrier or public utility to price in accordance with the terms of the applicable tariff that it has filed with its regulatory commission; it may not vary those terms by agreement with its customer. American Tel. & Tel. Co. v. Central Office Tel. Inc., 141 L. Ed. 2d 222, 118 S. Ct. 1956, 1962-63 (1998); Security Services, Inc. v. Kmart Corp., 511 U.S. 431, 435-40, 128 L. Ed. 2d 433, 114 S. Ct. 1702 (1994); Cahnmann v. Sprint Corp., 133 F.3d 484, 487 (7th Cir. 1998); Hargrave v. Freight Transportation Service, Inc., supra. This rule is subject, as BOCT points out, to a provision of the Interstate Commerce Act, since repealed, that allowed intercarrier agreements to supersede filed tariffs but required that the agreement be itself filed with the Commission. 49 U.S.C. § 10713(b) (1994 ed.). (The current law, with an immaterial exception, see 49 U.S.C. § 10709(d)(1), does not require that the agreement be filed.) As the interchange agreement between BOCT and WCL was not filed, there is doubt whether it can supersede a filed tariff, though we cannot find a case on the point and this case is certainly remote from the purpose of the filed-rate doctrine, which is to prevent shippers from negotiating secret discounts with carriers. New York, New Haven & Hartford R.R. v. ICC, 200 U.S. 361, 391, 26 S. Ct. 272, 50 L. Ed. 515 (1906); Cahnmann v. Sprint Corp., supra, 133 F.3d at 487; Carriers Traffic Service, Inc. v. Anderson, Clayton & Co.,

881 F.2d 475, 480-81 (7th Cir. 1989). WCL is not a shipper; and the interchange agreement incorporated the filed tariff and so did not entitle BOCT to a higher than tariff rate but only to a longer period of limitations.

WCL argues that arbitrators cannot be trusted to apply the filed-rate doctrine because they might make a mistake (they may have made one here, though this is far from clear, as we have just seen), and it is harder to correct an arbitrator's mistake on judicial review than a district judge's because the scope of judicial review of arbitral awards is so narrow. But if this argument were accepted, no issue of law, or perhaps no issue, period, could ever be arbitrated (or else the scope of judicial review would have to be changed, as one court believes, as we're about to see). It used to be thought that many, perhaps most, statutory claims, which are more likely to present issues of law than contract claims, were nonarbitrable. But the pendulum has swung and now it seems that most, perhaps all, statutory claims are arbitrable. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985); Seus v. John Nuveen & Co., 146 F.3d 175, 1998 U.S. App. LEXIS 11907, 1998 WL 294020 at *7-8 (3d Cir. 1998); but see Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1187-1200 (9th Cir. 1998), unless the statute prohibits arbitration. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226-27, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 596, 113 L. Ed. 2d 622, 111 S. Ct. 1522

(1991); cf. Pryner v. Tractor Supply Co., 109 F.3d 354, 364-65 (7th Cir. 1997). The arbitrability of statutory claims entails that arbitrators can decide questions of statutory interpretation, see Rootberg v. Central States, Southeast & Southwest Areas Pension Fund, 856 F.2d 796, 800 (7th Cir. 1988); Coastal Oil of New England, Inc. v. Teamsters Local A/W, 134 F.3d 466, 469-70 (1st Cir. 1998); DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 825 (2d Cir. 1997); Cole v. Burns Int'l Security Services, 323 U.S. App. D.C. 133, 105 F.3d 1465, 1468-69, 1478 (D.C. Cir. 1997), such as the status of an unfiled interchange agreement. Cole suggests that judicial review of an arbitrator's answer to a question of law is broader than the normally extremely limited judicial review of arbitral awards, see 105 F.3d at 1468-69, but that is of no significance in this case.

No provision of the Interstate Commerce Act expressly forbids the arbitration of claims under the Act. But the cases we have cited hold that the statutory prohibition need not be express to be effective; as in other cases of preemption, it is enough if allowing arbitration would disrupt the statutory scheme. And so it is pertinent to note that the doctrine of primary jurisdiction confides some issues in litigation under the Interstate Commerce Act to the ICC (now the STB) even when the litigation is brought in court rather than in the agency, and the doctrine may therefore be said to evince distrust of judges and conceivably of arbitrators as well. Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 743-45, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981). The central issue that the doctrine confides to the agency is the reasonableness of the terms in the tariff. Burlington Northern Inc. v. United States, 459 U.S. 131, 141, 74 L. Ed. 2d 311, 103 S. Ct. 514 (1982); Advance United

Expressways, Inc. v. Eastman Kodak Co., 965 F.2d 1347, 1353 (5th Cir. 1992); Duffy v. BMC Industries, Inc., 938 F.2d 353, 356-57 (2d Cir. 1991). The district judge was therefore right to refer that [*21] issue (and the closely related issue of whether the tariff was discriminatory) to the Surface Transportation Board.

The doctrine of primary jurisdiction is also sometimes invoked with regard to issues of tariff interpretation involving highly technical matters central to the agency's mission and expertise. Advance United Expressways, Inc. v. Eastman Kodak Co., supra, 965 F.2d at 1353; Duffy v. BMC Industries, Inc., supra, 938 F.2d at 356. An issue of tariff interpretation that does not involve such matters may, as these same cases make clear, be decided by the court without a reference to the agency. And if by a court, why not by an arbitrator? Arbitrators regularly interpret highly complex, technical contracts. They are competent to interpret run-of-the-mill railroad tariffs as well. Most tariffs are a good deal less complex than patent licensing contracts, large-scale construction contracts, aircraft leases, executive employment contracts, long-term requirements contracts--and for that matter most insurance policies.

The particular issue in controversy here, however, is neither one of tariff interpretation nor one of the reasonableness of the tariff rate. The issue is the lawfulness of BOCT's charging WCL under the interchange agreement when the agreement had not been filed with the STB. This is an issue of law rather than a matter within the special expertise of the STB, and therefore it did not have to be referred to the agency. Courts regularly decide the scope of the filed-tariff doctrine,

see, e.g., Security Services, Inc. v. Kmart Corp., supra; Marcus v. American Tel. & Tel. Co., 138 F.3d 46, 58-60 (2d Cir. 1998), and that is all that is involved here, except that it was an arbitral panel rather than a court that was called on to make the decision. Neither of the parties suggests that the Chevron doctrine extends the doctrine of primary jurisdiction to pure issues of law, even if the law in question is the organic statute of the regulatory agency, though there is the hint of such a position in Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355, 366-67, 127 L. Ed. 2d 183, 114 S. Ct. 855 and n. 10 (1994). See also 2 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 14.3, pp. 285-86 (1994).

In any event, the doctrine of primary jurisdiction is not, despite its name, jurisdictional. Northwest Airlines, Inc. v. County of Kent, supra, 510 U.S. at 366 n. 10; Gross Common Carrier, Inc. v. Baxter Healthcare Corp., 51 F.3d 703, 706 (7th Cir. 1995); Johnson v. Artim Transportation System, Inc., 826 F.2d 538, 548 (7th Cir. 1987); but cf. MCI Telecommunications Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1106 (3d Cir. 1995). Indeed, it presupposes that the court (or other tribunal in which the case is pending--WCL could have asked the arbitrators to refer the issue of compliance with the filed-rate doctrine to the Surface Transportation Board) has jurisdiction over the case. It is therefore waivable, as in the cases just cited (all but MCI, where the court, over a dissent, deemed the doctrine jurisdictional--but it was really talking about an area of exclusive state jurisdiction). It was waived here by the agreement to submit to arbitration issues that the doctrine would otherwise assign to an administrative agency. Were the issue one of transcendent importance to the administration of the Interstate

Commerce Act and we were so advised in an amicus curiae brief filed by the STB, we would relieve the parties of their waiver. Gross Common Carrier, Inc. v. Baxter Healthcare Corp., 51 F.3d 703, 706 (7th Cir. 1995); Johnson v. Artim Transportation System, Inc., supra, 826 F.2d at 548; New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157, 161 (1st Cir. 1989). There is nothing of that sort here.

BOCT does not argue that WCL waived the right to challenge before the Surface Transportation Board a tariff covering the same service as the interchange agreement (the agreement containing the arbitration clause), even though the terms of the tariff were incorporated in the agreement. So we need not consider the efficacy of such a waiver.

We can set quickly to one side WCL's second argument, that whether or not a filed-tariff defense is arbitrable the judge told the parties it was not and this is why WCL didn't raise the defense in the arbitration. There is a simple answer: he didn't tell them that. He merely warned them that the arbitration might moot some of WCL's defenses.

The third argument is that since the filed-tariff doctrine forbids parties to contract around the tariffed rate, the doctrine cannot be waived by not being presented in an arbitration, whatever might be the case with other invocations of the doctrine of primary jurisdiction. But in thus treating the filed-tariff doctrine as one forbidding waivers, WCL confuses a rule limiting freedom of contract with a rule limiting procedural waivers, such as the rule that makes objections to subject-matter jurisdiction nonwaivable. The filed-tariff doctrine limits the power

of a seller and a buyer to negotiate a price different from the price in a filed tariff. It is not addressed to the rules of procedure that come into play when, the parties' contractual relation having broken down, they find themselves in litigation with each other. The logic of WCL's argument is that, had it failed to file a notice of appeal within the prescribed thirty days, it could still have filed it later; otherwise its filed-tariff claim would have been forfeited and then BOCT, in defiance of the filed-tariff doctrine, might get away with an episode of off-tariff pricing. The argument, rejected in West Coast Truck Lines, Inc. v. American Industries, Inc., 893 F.2d 229, 234 (9th Cir. 1990), would be as absurd as an argument that since usurious contracts are unenforceable, a usury claim cannot be waived. (That argument has also been rejected. McCarthy v. First National Bank, 223 U.S. 493, 498, 56 L. Ed. 523, 32 S. Ct. 240 (1912); Whirlpool Financial Corp. v. Sevaux, 96 F.3d 216, 227 (7th Cir. 1996).) By failing to present its filed-tariff defense to the arbitrators, WCL waived it as surely as if it had failed to present it to the district court or this court.

Affirmed.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, an Illinois corporation,
Plaintiff,

v.

WISCONSIN CENTRAL, LTD., an Illinois corporation,
Defendant.

WISCONSIN CENTRAL, LTD., an Illinois corporation,
Counter-Plaintiff,

v.

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, an Illinois corporation, and CSX TRANSPORTATION, INC., a Virginia corporation,
Counter-Defendants.

No. 93 C 3519

August 28, 1997, Decided
September 2, 1997, Docketed

COUNSEL: For BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, The, plaintiff: Thomas Maurice Weithers, Central States Law Department, Rosemont, IL.

For BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, The, plaintiff: James R. Gannon, Douglas Allan Lindsay, Paul V. Esposito, Lewis, Overbeck & Furman, Chicago, IL.

For WISCONSIN CENTRAL, LTD., defendant: James A. Fletcher, Lois K. Winston, Oppenheimer, Wolff & Donnelly, Chicago, IL.

For WISCONSIN CENTRAL, LTD., defendant: Janet H. Gilbert, Wisconsin Central Ltd., Rosemont, IL.

For CSX TRANSPORTATION, INC., BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, counter-defendants: Thomas Maurice Weithers, Central States Law Department, Rosemont, IL.

For CSX TRANSPORTATION, INC., BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, counter-defendants: James R. Gannon, Douglas Allan Lindsay, Paul V. Esposito, Lewis, Overbeck & Furman, Chicago, IL.
For WISCONSIN CENTRAL, LTD., counter-claimant: James A. Fletcher, Lois K. Winston, Oppenheimer, Wolff & Donnelly, Chicago, IL.

For WISCONSIN CENTRAL, LTD., counter-claimant: Janet H. Gilbert, Wisconsin Central Ltd., Rosemont, IL.

JUDGES: William T. Hart, UNITED STATES DISTRICT JUDGE.

OPINIONBY: William T. Hart

OPINION: MEMORANDUM OPINION AND ORDER

On April 3, 1997, an arbitration panel ("Panel") issued a supplemental arbitration award ("Supplemental Award"), awarding plaintiff The Baltimore and Ohio Chicago Terminal Railroad Company ("BOC") $ 1,178,130.27 in damages and $ 2,343.45 per day in interest for each day after February 28, 1997 that the Supplemental Award and an earlier arbitration award issued on June 10, 1996 ("Initial Award") remain unpaid. BOC now moves for confirmation of the Supplemental Award and entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b) as to its claims for confirmation of the Awards. Defendant Wisconsin Central, Ltd. ("WCL") does not challenge the accuracy of the calculated award. However, it opposes entering final judgment, and states that if BOC's claims are certified, it requests (i) entry of final judgment on the order denying WCL leave to reinstate Counts I and IV of is amended counterclaim; and (ii) a stay of enforcement of the judgment pursuant to Federal Rule of Civil Procedure 62(h) pending resolution of its claims pending before the Surface Transportation Board ("STB")[1]

I. MOTION TO CONFIRM SUPPLEMENTAL AWARD

A brief recitation of the relevant procedural history of this case follows: On June 10, 1996, the Panel issued the Initial Award to BOC and against WCL for intermediate switching charges and car hire reclaims. In a memorandum opinion and order dated January 29, 1997, this court confirmed the Initial Award. Baltimore and Ohio Chicago Terminal R. Co. v. Wisconsin Central, Ltd., 1997 WL 51460 (N.D. Ill. Feb. 3, 1997). Because the Initial Award did not calculate all damages due to BOC under the Interchange Agreement, the case was remanded to the arbitration panel to determine the amount of switching charges WCL owed to BOC for the period from September 1, 1995 through August 4, 1996 and to calculate the amount of additional interest assessable against WCL. Id. at *14. In addition, Counts II and III of WCL's amended counterclaim were reinstated and referred to the STB for disposition. Id. at *7. WCL's motion to reinstate its claims was denied as to Counts I and IV of its amended counterclaim. Id. at *7, 14.

After this case was remanded to the Panel, BOC and WCL submitted written computations of the remaining charges and interest due BOC. In the interest of expediency, BOC agreed to entry of an award according to WCL's calculations. The Panel issued the Supplemental Award in that amount.

The Supplemental Award consists of the following damages: (i) $ 521,745.00 for the principal amount of intermediate switching charges for the period from June 1, 1996 through August 4, 1996; (ii) $ 493,201.80 plus $ 42,448.77 plus $ 16,555.59 in interest at the five percent statutory interest rate on Items 1, 3 and 5 of the Initial Award through February 28,

1997; and (iii) $ 104,179.11 in interest at the five percent statutory interest rate on intermediate switching charges for the period from September 1, 1995 through August 4, 1996. In addition, the Panel awarded BOC $ 2,343.45 per day (based on a five percent interest rate) in interest for each day the Awards remain unpaid after February 28, 1997.

WCL does not oppose entry of the Supplemental Award other than on the grounds it asserted in objecting to confirmation of the Initial Award -- namely that the Interchange Agreement between the parties does not require WCL to pay intermediate switching charges unless BOC requests that WCL block cars and WCL fails to do so. The grounds raised by WCL in its opposition to confirmation of the Initial Award have already been decided against WCL, see id. at *9 - 14, and that ruling controls now. The Supplemental Award will be confirmed in the amount of $ 1,178,130.27 plus interest of $ 2,343.45 per day for each day after February 28, 1997 that the Initial and Supplemental Awards remain unpaid.

II. MOTION FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(B)

BOC first moves for entry of final judgment on its claim to confirm the Awards. Rule 54(b) of the Federal Rules of Civil Procedure states that when multiple claims are involved in an action, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). A claim certified pursuant to Rule 54(b)

must be final and separate from the remaining claims. ODC Communications Corp. v. Wenruth Investments, 826 F.2d 509, 512 (7th Cir. 1987). In addition, the district court must determine that there is no just reason for delay in entering judgment. Id. "The test for separate claims under the rule is whether the claim that is contended to be separate so overlaps the claim or claims that have been retained for trial that if the latter were to give rise to a separate appeal at the end of the case the court would have to go over the same ground that it had covered in the first appeal." Lawyers Title Ins. Corp. v. Dearborn Title Corp., 118 F.3d 1157, 1997 WL 364536, *5 (7th Cir. 1997) (citing Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 8, 64 L. Ed. 2d 1, 100 S. Ct. 1460 (1980)). Some overlap between the claims, however, is not fatal. Id.

BOC argues that its claims are separate from WCL's claims pending in the STB ("STB claims") because they involve different issues and almost no factual overlap. In its STB claims, WCL asserts that the rates charged by BOC were both unreasonable and discriminatory in violation of the Interstate Commerce Act ("ICA"). In reinstated Count II, WCL asserts that BOC's $ 105 per car rate is unreasonable and violates 49 U.S.C. § 10701(d). In reinstated Count III, WCL asserts that BOC unreasonably discriminated against WCL in violation of 49 U.S.C. § 10741 by not charging or by charging lower rates to other carriers.

On the other hand, the Awards are based on BOC's claim for breach of the Interchange Agreement. At the arbitration hearing, there was no dispute that BOC provided intermediate switching services to WCL. The only question was

whether WCL was obligated to pay for the services, according to BOC's filed tariff rate, under the Interchange Agreement. The Panel ruled that the Interchange Agreement required WCL to pay for switching services and awarded damages accordingly.

Although neither party raises Reiter v. Cooper, 507 U.S. 258, 122 L. Ed. 2d 604, 113 S. Ct. 1213 (1993), that case addresses nearly identical issues as the instant case. In Reiter, the Supreme Court discussed whether a Rule 54(b) ruling would be proper for judgment in a carrier's action to collect its tariff when the defendant was pursuing an unreasonable rate claim in front of the Interstate Commerce Commission, the predecessor agency to the STB. In Reiter, the plaintiff motor carrier had negotiated rates with a shipper that were lower than its filed tariff rate. Id. at 260-61. After the carrier went bankrupt, the bankruptcy trustee brought an action to collect the difference between the negotiated rates and the tariff rates. In defense, the shipper raised unreasonable practice and unreasonable rate claims under 49 U.S.C. § 10801(a). [2] The Bankruptcy Court refused to refer the shipper's claims to the Interstate Commerce Commission and it entered judgment for the carriers on their filed rate claim. The district court reversed the Bankruptcy Court and referred the case to the ICC; the Court of Appeals reversed the district court, holding that the unreasonable rate claim was not an obstacle to the carrier's action.

The Supreme Court granted certiorari to address the question of whether a court should proceed to judgment on a carrier's suit to collect tariff rates where the shipper defends itself by claiming that the carrier's rates were unreasonable. Id. at 260. The Supreme Court held that the shippers' unreasonable

rate claims were subject to the ordinary rules governing counterclaims. Id. at 270. It reversed the judgment of the Court of Appeals and remanded the case, explaining as follows:

> Neither the Court of Appeals nor the District Court made the "express determination" required under Rule 54(b) for entry of a separate judgment on respondents' claims, and we cannot say categorically that it would be an abuse of discretion either to grant or to deny separate judgment. In the ordinary case, where a carrier is solvent and has promptly initiated suit, the equities favor separate judgment on the principal claim: referral of the unreasonable-rate issue could produce substantial delay, and tariff rates not disapproved by the ICC are legal rates, binding on both the shipper and the carrier.

Id. The Supreme Court further explained that "conceivably, a district court could determine that other equities favor separate judgment -- for example, a threat that the shipper may become insolvent, which Rule 62(h) would allow a court to protect against by entering separate judgment for the carrier but staying enforcement on condition that the shipper deposit the amount of the judgment with the court . . . ." Id.

Reiter, therefore, implicitly acknowledges that an action relating to a carrier's filed tariff rate may be separate from an unreasonable rate claim and the equities of a given case may make entry of judgment on the carrier's claim appropriate. Although the dispute in Reiter arose between a motor common

carrier and a shipper, the facts are analogous to the instant case and the reasoning is applicable. BOC's motion for entry of judgment pursuant to Rule 54(b) will be examined under these guidelines, as well as under Seventh Circuit law requiring analysis of the potential overlap between successive appeals.

In the instant case, the claims of WCL and BOC both arise out of BOC's provision of intermediate switching services, but there is little overlap between the claims. BOC's claim for relief under the Interchange Agreement centered on the interpretation of the Interchange Agreement. At the arbitration hearing, both sides called witnesses who had negotiated the Interchange Agreement to testify to their understanding of terms in the agreement. No issues relating to the interpretation of the Interchange Agreement are raised in WCL's STB claims. Instead, WCL's unreasonable rate claim concerns BOC's cost of providing service, reasonable profits, charges to other lines and market dominance. WCL's discrimination claim raises issues such as similarity of circumstances, similarity of services, charges to other carriers, preferential treatments, WCL's competitors and WCL's competitive injury. Although BOC's claims and WCL's STB claims have in common BOC's provision of intermediate switching services, they involve significantly different issues.

Little likelihood exists that a reviewing court would be required to cover the same ground on successive appeals or that appealable issues would overlap between BOC's and WCL's claims. Review of an arbitration award is "extremely narrow." Ethyl Corp. v. United Steelworkers of America, AFL-CIO-CLC, 768 F.2d 180, 183 (7th Cir. 1985). Grounds for vacating or modifying an arbitration award are limited to those

circumstances identified in § 10 and § 11 of the Federal Arbitration Act. 9 U.S.C. §§ 9, 10. The merits of the arbitrator's decision are not reviewed, but rather, only certain circumstances are reviewed concerning the conduct of the arbitrator and how the award was obtained. Fitigues, Inc. v. Varat Enterprises, Inc., 813 F. Supp. 1336, 1339 (N.D. Ill. 1992). A court may not vacate an arbitrator's interpretation of a contract even if the court is convinced that the interpretation was plainly wrong. Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991). In opposing confirmation of the Initial Award, WCL argued that the Panel had acted improperly in arbitrarily disregarding the testimony of its witness Thomas Schmidt; that the Panel had improperly disregarded Illinois' implied duty of good faith in interpreting the contract and that the Panel did not apply unambiguous language of the Interchange Agreement. The issues likely to be raised on appeal have almost nothing in common with potentially appealable issues arising out of WCL's STB claims.

WCL asserts that "the awards plainly do not 'fully and completely' adjudicate how much WCL owes BOCT for intermediate switching services under the Agreement." The Interchange Agreement, however, required arbitration of "any irreconcilable dispute arising between the parties with respect to this Agreement." This court ordered the parties to arbitrate all arbitrable disputes. By definition, the interpretation of the Interchange Agreement has been fully adjudicated and cannot be relitigated before the STB. Indeed, WCL was not permitted to reinstate Counts I and IV because those claims raised arbitrable issues. Regardless of what action the STB takes as to WCL's complaint, it cannot vacate or modify the Panel's interpretation of the Interchange Agreement. The issues before the STB are

whether WCL is entitled to damages because BOC discriminated against it or charged it an unreasonable rate. BOC's claims and WCL's STB claims are separate from each other and there is no just reason for delay in entering judgment on BOC's claims.

Additionally, the order denying WCL leave to reinstate Counts I and IV should be certified along with BOC's claims as part of the final judgment because they are properly considered part of the arbitration portion of the case. WCL was denied leave to reinstate both of these claims on the grounds that they were arbitrable claims. In Count I, WCL sought a declaratory judgment that the "filed rate doctrine" applied to the parties' dispute. WCL was not permitted to reinstate Count I because it was directly related to the Interchange Agreement and a successful outcome for WCL on Count I would have rendered the Award uncollectible. Hence, Count I was deemed arbitrable and thus it was waived by WCL when it failed to raise the claim at the arbitration hearing. Appealable issues arising out of the order would concern whether Count I was arbitrable or whether Count I stated a claim for relief. Deciding these issues would not overlap with issues arising from WCL's STB claims. Because reinstating Count I may affect the validity of the rate provision of the Interchange Agreement and thus the enforceability of the Award, it would be appropriate to consider the viability of Count I along with other appealable issues contesting the Awards.

In Count IV, WCL alleged that CSX had agreed to engage in direct interchange of freight cars with WCL. Because the direct interchange argument had been raised by the parties

at the arbitration hearing and the Panel had rendered a decision against WCL as to this issue, WCL was not permitted to relitigate the issue of a direct interchange. In addition, Count IV did not adequately state a cause of action for an unequal facilities claim under 49 U.S.C. § 10742. Unlike Count I, however, a successful outcome would not likely affect the validity of the Awards. Similar to WCL's STB claims, the issues raised in a properly pleaded unequal facilities claim would implicate issues relating to the market as a whole and BOC's provision of services to WCL. In the present procedural posture of Count IV, however, there is no danger that a reviewing court would have to consider these potentially overlapping issues. The appealable issues would center on the WCL's ability to reinstate Count IV, not the merits of the claim. Even if a reviewing court should proceed to analyze whether Count IV stated an unequal facilities claim, this threshold determination would not likely overlap with any issues raised on appeal of WCL's STB claims. If the Seventh Circuit should decide that Count IV should have been reinstated, this claim could be referred to the STB. This decision should be made sooner rather than later. Count IV is properly considered part of the arbitration-related claims. There is no just reason for delay in entering judgment on the order dismissing Counts I and IV of WCL's amended counterclaim. Final judgment will be entered as to the confirmation of the Awards and the denial of leave to reinstate Counts I and IV of WCL's amended counterclaim.

III. STAY OF ENFORCEMENT OF JUDGMENT

Pursuant to Federal Rule of Civil Procedure 62(h), WCL requests a stay of enforcement of the Awards until its STB claims are resolved. Rule 62(h) provides as follows:

Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Fed. R. Civ. P. 62(h). WCL asserts that case law under Rule 62(d) concerning granting a stay upon appeal should be utilized to analyze whether a bond would be appropriate in this case. These factors principally address the financial stability of the defendant. See, e.g., Dillon v. City of Chicago, 866 F.2d 902, 904-05 (7th Cir. 1989). WCL submits the affidavit of Thomas Power, Jr., Executive Vice President and Chief Financial Officer of WCL's parent company, Wisconsin Central Transportation Corporation ("WCTC"). Power states that WCTC is a publicly-traded corporation with a market capitalization of approximately $ 1.7 billion and $ 48 million in net income in 1996. In addition, Power states that WCTC has a current unused credit line of nearly $ 100 million.

WCL argues that "case law indicates that stays under Rule 62(h), either with or without bond, are granted on a routine basis," but a review of the law demonstrates that WCL overstates the law. Rather, stays are granted on a case-by-case basis upon an examination of the equities of delaying enforcement of the judgment. E.g., Gen-Pa Bigli Islem Ltd. Liability

Co. v. Virtual Technology, Inc., 169 F.R.D. 84 (E.D. Mich. 1996) (denying stay because counterclaim did not act as a set-off to judgment and waiting for subsequent judgment could deprive plaintiff of the sum owed to it indefinitely). A narrow focus on WCL's resources to pay BOC does not fully address the relevant circumstances favoring or disfavoring issuing a stay. A broader inquiry into the equities of allowing the stay is especially appropriate here considering the indefinite nature of the requested stay.

BOC argues that the Fifth Circuit's decision in Southern Pacific Transp. Co. v. San Antonio, Tex. By and Through City Public Service Bd., 748 F.2d 266 (5th Cir. 1984) counsels against issuing a stay in this case. In San Antonio, the Fifth Circuit held that the district court erred when it stayed enforcement of a judgment for a carrier under the filed rate doctrine until the defendant shipper's unreasonable rate claims were adjudicated before the ICC. The court held that allowing a stay interfered with the filed rate doctrine, which was part of the Interstate Commerce Act's "balanced and coherent system of the payment and review of rates." Id. at 274. The court concluded that the "trial courts' stay only threatens to add further, indefinite delay as the plaintiffs await a series of decisions by the I.C.C. . . . . This case has dragged on long enough without the railroad being able to collect their filed rate." Id.

Two poicop should be noted as to San Antonio . First, Fifth Circuit law at the time San Antonio was decided required the shipper to pay the tariff rate first before filing for review and reparations in the ICC. Id. The Supreme Court subsequently rejected the "pay first" rule. Reiter, 507 U.S. at 267-68. Second, unlike the situation in San Antonio, this case is not a classic

filed rate doctrine case, since the arrangement between the parties was negotiated and embodied in a written agreement obligating WCL to pay BOC's filed tariff rate. Nonetheless, San Antonio is instructive to this action for the general principle that an unreasonable rate claim in the ICC (or STB) does not in itself provide grounds for a stay in execution of a judgment to pay a carrier's fees. In addition, San Antonio demonstrates that considering a broad range of principles in deciding whether to issue a stay, such as the purpose of the statutory scheme involved and the equity of allowing further delay, is appropriate.

WCL has not demonstrated that it is entitled to a stay of enforcement of the judgment against it. Several factors illustrate that imposing a stay and creating further delay would be inequitable. This case is over four yars old. There is no timetable for resolution of WCL's claims before the STB. Moreover, WCL has not demonstrated its expediency in pursuing its claims before the STB. The opinion in this case referring the claims to the STB was issued on January 29, 1997. Over two months passed before WCL filed its claims in the STB on April 7, 1997.

Second, at five percent, BOC is receiving a relatively low interest rate on its damages. Cf. Hartford Accident and Indemnity Co. v. Boise Cascade Corp., 489 F. Supp. 855, 859 (N.D. Ill. 1980) (finding the equities weighed in favor of Rule 54(b) certification because the plaintiff was receiving the prejudgment rate of interest of eight percent that was lower than what was available on the open market). BOC's damages under the Interchange Agreement date back to 1987. This represents a significant period of time during which BOC has been required to accept a below-market interest rate.

Further, WCTC's asserted financial stability is not a sufficient reason in itself to overcome the factors weighing against the stay. In addition, the evidence of WCTC's ability to pay -- general market capitalization, earnings and revenue information of its parent company for 1996 -- is not necessarily indicative of WCL's ability to pay. WCL did not present any sort of agreement or accounting records indicating WCTC had set aside $ 20 million to pay WCL's obligations under the Awards. The fact that WCL's parent company currently has available a $ 100 million line of credit does not mean that the line of credit will be available several years down the line when it comes time to make payment to BOC.

Finally, the two applicable cases decided by appellate courts, Reiter and San Antonio indicate that allowing a solvent carrier to enforce a judgment while an unreasonable rate claim is pending may be appropriate under certain circumstances. Reiter's statement that the equities ordinarily favor separate judgment because referral of the unreasonable rate issue could result in substantial delay signifies the importance of allowing carriers to promptly enforce judgments under their tariff rates. It would be inappropriate to allow further delay by means of a stay under Rule 62(h), although such delay is disfavored under Rule 54(b). WCL has not identified any factors that would shift the equities in its favor. A stay under Rule 62(h) will not be issued.

IT IS THEREFORE ORDERED that:

(1) The motion of defendant Wisconsin Central, Ltd. for leave to file a surreply [75-1] is granted.

(2) The motion of plaintiff The Baltimore and Ohio Chicago Terminal Railroad Company and counter-defendant CSX Transportation, Inc. to enter final judgment on the arbitration awards [70-2] is granted. The Clerk of the Court is directed to enter judgment as follows:

(a) The motion of plaintiff The Baltimore and Ohio Chicago Terminal Railroad Company and counter-defendant CSX Transportation, Inc. to confirm the supplemental arbitration award [70-1] is granted.

(b) The supplemental arbitration award is confirmed in the amount of (i) $ 1,178,130.27 in damages, and (ii) $ 2,343.45 per day in interest for each day after February 28, 1997 that the arbitration awards against WCL remain unpaid.

(c) Final judgment is entered pursuant to Federal Rule of Civil Procedure 54(b) as to (i) the claims of plaintiff The Baltimore and Ohio Chicago Terminal Railroad Company and counter-defendant CSX Transportation, Inc. to confirm its arbitration awards, and (ii) the dismissal of Counts I and IV of defendant Wisconsin Central, Ltd.'s amended counterclaim.

(d) A stay of enforcement of the judgment pursuant to Federal Rule of Civil Procedure 62(h) is denied.

(3) This case is dismissed from this court's docket without prejudice and with leave to timely move to reinstate to confirm or vacate an order of the Surface Transportation Board.

ENTER:

William T. Hart

UNITED STATES DISTRICT JUDGE

DATED: AUGUST 28, 1997

Footnotes

n1 WCL's motion for leave to file a surreply will be granted.

n2 Although the shippers had raised the unreasonable rate and unreasonable practice issues as a defense, the Court held that the claim was technically a counterclaim and analyzed it as such. Reiter, 507 U.S. at 265.

Appendix C

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, an Illinois corporation, Plaintiff, v. WISCONSIN CENTRAL, LTD., an Illinois corporation, Defendant. WISCONSIN CENTRAL, LTD., an Illinois corporation, Counter-Plaintiff, v. THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, an Illinois corporation, and CSX TRANSPORTATION, INC., a Virginia corporation, Counter-Defendants.

No. 93 C 3519

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1997 U.S. Dist. LEXIS 1114

January 29, 1997, Decided
February 3, 1997, DOCKETED

DISPOSITION: Motion of Baltimore and Ohio Chicago Terminal Railroad Company and CSX Transportation, Inc. to file surreply to Wisconsin Central, Ltd.'s motion to reinstate its counterclaims [55-1] granted. Motion of Baltimore and Ohio Chicago Terminal Railroad Company and CSX Transportation, Inc. to confirm and enter judgment on arbitration award [39-1,2] granted in part and denied in part. Wisconsin Central, Ltd.'s motion to vacate or modify arbitration award [41-1,2] denied. Determination as to contested $ 779,205.00 in switching charges owed to Baltimore and Ohio Chicago Terminal

Railroad Company from September 1, 1995 through August 4, 1996 remanded to arbitration panel. Determination as to amount of interest owed to Baltimore and Ohio Chicago Terminal Railroad Company remanded to Panel. Jurisdiction retained for purpose of confirming and entering any supplemental amounts awarded by arbitration panel. Wisconsin Central, Ltd.'s motion for stay of judgment denied as moot. Wisconsin Central, Ltd.'s motion to reinstate its counterclaims [37-1] granted in part and denied in part. Wisconsin Central, Ltd.'s motion denied with prejudice as to Counts I and IV and granted as to Counts II and III. [*2] Counts II and III of WCL's amended counterclaim referred to Surface Transportation Board. Counts II and III stayed pending consideration by Surface Transportation Board. Baltimore and Ohio Chicago Terminal Railroad Company and CSX Transportation, Inc.'s motion to file supplemental damages affidavit, simplify issues and conditionally waive part of its claim [58-1] denied. Case dismissed without prejudice and with leave to timely move to reinstate to confirm or vacate any subsequent arbitration order or order of Surface Transportation Board.

COUNSEL: For BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, The, an Illinois corporation, plaintiff: Thomas Maurice Weithers, Central States Law Department, Rosemont, IL. James R. Gannon, Douglas Allan Lindsay, Paul V. Esposito, Lewis, Overbeck & Furman, Chicago, IL.

For WISCONSIN CENTRAL, LTD., an Illinois corporation, defendant: James A. Fletcher, Lois K. Winston, Oppenheimer,

Wolff & Donnelly, Chicago, IL. Janet H. Gilbert, Wisconsin Central Ltd., Rosemont, IL.

For CSX TRANSPORTATION, INC. PENSION PLAN, BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, counter-defendants: Thomas Maurice Weithers, Central States Law Department, [*3] Rosemont, IL. James R. Gannon, Douglas Allan Lindsay, Paul V. Esposito, Lewis, Overbeck & Furman, Chicago, IL.

For WISCONSIN CENTRAL, LTD., counter-claimant: James A. Fletcher, Lois K. Winston, Oppenheimer, Wolff & Donnelly, Chicago, IL. Janet H. Gilbert, Wisconsin Central Ltd., Rosemont, IL.

JUDGES: WILLIAM T. HART, UNITED STATES DISTRICT JUDGE

OPINION BY: WILLIAM T. HART

OPINION: MEMORANDUM OPINION AND ORDER

After a lengthy arbitration, Baltimore and Ohio Chicago Terminal Railroad Company ("BOC") and its parent company, CSX Transportation, Inc. ("CSX"), seek an order confirming and entering judgment on a $ 19 million award entered in its favor and against Wisconsin Central, Ltd. ("WCL"). Also pending is WCL's motion to vacate or modify the arbitration award and WCL's motion to file an amended counterclaim against BOC and CSX. n1 Finally, BOC moves for leave to file a supplemental affidavit and conditionally waive part of its claim.

I. BACKGROUND

On October 11, 1987, WCL began operations as an interline rail carrier serving parts of Illinois, Wisconsin, Michigan and Minnesota. Before commencing its operations, WCL arranged for the interchange of its eastbound traffic at Chicago. These arrangements were necessary because WCL's railroad tracks were not physically contiguous with most of the carriers with which it did business. If two interline carriers can reach each other either by using their own tracks or the tracks of the other carriers, they can directly interchange cars. If, however, two interline carriers rails do not meet end-to-end, intermediate switching allows the carriers to exchange traffic via an intermediate carrier. The intermediate switching carrier picks up rail cars to be interchanged from one interline carrier and delivers them to the other and, in return, receives a fee. WCL decided to contract with BOC to deliver its cars to eastbound carriers.

BOC is an intermediate switching carrier operating within the Chicago Switching District ("District"). BOC owns Barr Yard, a rail classification yard located within the District at Riverdale, Illinois. Since 1987, WCL has delivered thousands of cars to Barr Yard for interchange to CSX.

CSX, like WCL, is an interline rail carrier, although CSX primarily serves the eastern United States. CSX normally delivers westbound traffic and picks up eastbound traffic at Chicago and St. Louis. CSX's rail line terminates just outside of the District, at Pine Junction Indiana, where its tracks connect with those of BOC and other railroads. None of CSX's rail lines or

classification yards within the District meet end-to-end with any of WCL's rail lines.

The procedural history of this case leading up to the decision of the arbitration panel is complex. On June 11, 1993, BOC filed an action against WCL to collect intermediate switching and car hire reclaim charges n2 pursuant to BOC's tariff on file with the Interstate Commerce Commission ("ICC"). In its answer and counterclaims against BOC, WCL alleged that an agreement among the parties, and not BOC's tariff on file with the ICC, governed the dispute over the charges. In addition, WCL alleged that BOC owed compensation to WCL under various theories of relief, including breach of the Interchange Agreement, promissory estoppel and quantum meruit.

Although BOC initially denied that an agreement existed between the parties, BOC later moved to amend its answer to WCL's counterclaims to acknowledge that a preliminary, but binding, draft interchange agreement ("Interchange Agreement") n3 existed. n4 BOC further moved to amend its complaint to add a claim against WCL based on the Interchange Agreement.

On January 10, 1994, BOC submitted a demand to WCL for arbitration pursuant to the mandatory arbitration provision of the Interchange Agreement. On March 1, 1994, an order was entered directing arbitration and allowing BOC to amend its complaint to add claims based on the Interchange Agreement. Baltimore and Ohio Chicago Terminal R. Co. v. Wisconsin Central, Ltd., 1994 U.S. Dist. LEXIS 2552, 1994 WL

71431 (N.D. Ill. 1994). WCL had opposed arbitration on the grounds that BOC had waived its right to invoke the mandatory arbitration provision because of its delay in demanding arbitration. These contentions were rejected and BOC's complaint and WCL's countercomplaint were dismissed without prejudice pending arbitration. Jurisdiction was retained to confirm any arbitration award or to consider a motion by either party to reinstate any nonarbitrable claim within 60 days after the issuance of an arbitration award.

Subsequently, the parties entered into a supplemental arbitration agreement and submitted their dispute to a panel of arbitrators (the "Panel"). On November 9, 1995, the arbitration hearings concluded. n5 On June 10, 1996, the Panel issued a written award ("Award"). The Panel awarded BOC (i) $ 17,276,290.30 for past intermediate switching charges, car hire reclaims, interest, and improper set-offs; (ii) the principal amount of intermediate switching charges on CSX-destined traffic that WCL delivered to BOC during the period from September 1, 1995 through June 10, 1996, along with interest at a statutory rate of five percent per annum on that amount; (iii) interest at the rate of five percent per annum from April 1, 1996 through June 10, 1996, on the amount of $ 13,188,146.00 in outstanding intermediate switching charges; and (iv) interest at the rate of five percent per annum from April 1, 1996 through June 10, 1996 on the amount of $ 1,135,070.35 in outstanding car hire reclaim charges. BOC and CSX submit the affidavit of Alison Brown, Assistant Controller - Revenue Reporting for CSX, which computes the amount of damages for (ii), (iii), and (iv) above though May 31, 1996 to be $ 2,702,536.90 based on BOC's billing records. The Award provides that interest will

continue to accrue on all amounts owed by WCL until paid.

BOC now moves to confirm and enter judgment on the Award in an amount of $ 19,978,827.20, which includes $ 17,276,290.30 as itemized in the award and $ 2,702,536.90 as computed in Alison Brown's affidavit. In addition, BOC requests that this court retain jurisdiction to enter a supplemental judgment on the Award for all additional charges incurred by WCL under the Interchange Agreement through August 4, 1996. n6 BOC also moves to file a supplemental damages affidavit, conditionally waive part of its claim, and simplify issues. Finally, WCL moves to reinstate its counterclaims.

II. JURISDICTION OVER MOTIONS BROUGHT UNDER THE FAA

Neither § 9 nor § 10 of the Federal Arbitration Act ("FAA") constitutes a grant of federal subject matter jurisdiction. Minor v. Prudential Securities, Inc., 94 F.3d 1103 (7th Cir. 1996); O'Leary v. Fanghella, 866 F. Supp. 1119, 1120 (N.D. Ill. 1994). Before a district court may entertain a motion to vacate or confirm under section § 9 or § 10 of the FAA, there must be an independent basis of federal jurisdiction. Minor, 94 F.3d at 1104-05; O'Leary, 866 F. Supp. at 1120. Since the parties are not diverse, they must base jurisdiction on the existence of a federal question. "Federal question jurisdiction arises only when the complaint alone 'establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" Minor, 94 F.3d at 1105 (quoting Franchise Tax. Bd. of

State of Cal. v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 27-28, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)).

Neither of the parties' FAA motions raises a federal question on its face. WCL moves to vacate the Award under § 10 of the FAA on the grounds that the Panel improperly disregarded evidence, disregarded Illinois law, ignored terms of the Interchange Agreement and miscalculated damages due BOC. BOC's motion to confirm and enter judgment on the Award under § 9 of the FAA raises no federal question on its face; it seeks to confirm an award for damages arising out of a breach of contract claim. Thus, the parties' motions under § 9 and § 10 of the FAA do not provide independent grounds for subject matter jurisdiction.

BOC asserts that jurisdiction nonetheless exists over the parties' FAA motions because Counts I through III of its complaint raise federal questions and the motions may be heard pursuant to the exercise of supplemental jurisdiction under 28 U.S.C. § 1367. Counts I through III of BOC's complaint asserted claims based on its tariff filed with the ICC. Those claims arose under the Interstate Commerce Commission Act ("ICC Act") and created federal question jurisdiction at the time BOC filed its complaint. BOC argues that these claims provide continuing jurisdiction over the case as a whole. In contrast, WCL contends that BOC's claims under its filed tariff cannot provide a basis for federal question jurisdiction because BOC abandoned these claims when it was permitted to amend its complaint to file claims based on the Interchange Agreement.

As an initial matter, WCL questions whether jurisdiction existed to enter the March 1, 1994 order directing arbitration. WCL suggests that the March 1, 1994 order should be vacated for a lack of jurisdiction. WCL contends that BOC's filed tariff claims did not confer jurisdiction over its motion to stay the proceedings because it is now clear that BOC did not intend to pursue its tariff claims subsequent to the arbitration proceeding. At the time the March 1, 1994 order was issued, however, it was unclear whether BOC's tariff claims would be mooted by the arbitration. The fact that the Panel subsequently found in BOC's favor and BOC did not move to reinstate its tariff claims did not affect the jurisdiction to enter the March 1, 1994 order. Thus, jurisdiction existed to enter the March 1, 1994 order because BOC's claims based on its filed tariff provided an independent basis for jurisdiction at the time the order was entered. The order will not be vacated.

Even if WCL is correct, however, and BOC's tariff claims did not provide a jurisdictional basis for the March 1, 1994 order, WCL's counterclaims brought under the ICC Act provided a second jurisdictional basis upon which to enter the order. The fact that WCL's action was brought as a counterclaim is immaterial, since it possessed independent grounds for jurisdiction, which conferred jurisdiction over the case even if BOC's original federal claims should have been dismissed. See, e.g., Amoco Production Co. v. United States, 852 F.2d 1574, 1579 (10th Cir. 1988).

Although jurisdiction existed to enter the March 1, 1994 order, the question of jurisdiction over the pending FAA motions is a separate inquiry. Again, there must be an existing

independent basis for jurisdiction to entertain these motions -- i.e., other viable pending claims. BOC argues that an independent basis for jurisdiction exists, as it did at the time the March 1, 1994 order was entered, because its original complaint contained claims brought under the ICC Act. BOC contends that jurisdiction was not terminated merely because a portion of this case was sent to arbitration. Although BOC's claims conferred jurisdiction over BOC's motion to stay the parties' nonarbitrable claims, BOC's tariff claims do not provide an independent basis for jurisdiction over the parties' FAA motions. Not only did BOC fail to reinstate the claims within the 60-day time limit, but an attempt to reinstate these claims would have been denied since these claims have been mooted by arbitration.[7]

On the other hand, WCL's ICC claims may provide independent jurisdictional grounds upon which to exercise supplemental jurisdiction to hear the parties' FAA motions. WCL has made a timely motion to reinstate its ICC claims. If WCL's motion to reinstate is granted, independent grounds of jurisdiction will exist because WCL's claims arise under a federal statute. Thus, WCL's motion to reinstate will be examined first.

III. WCL'S MOTION TO REINSTATE ITS COUNTERCLAIMS

WCL moves to reinstate its counterclaims against BOC. WCL's amended countercomplaint contains four Counts. Count I seeks a declaratory judgment that BOC can recover intermediate switching charges only under its tariff on file with the ICC. In Count II, WCL alleges that BOC's tariff is unreasonable, in

violation of 49 U.S.C. § 10701(d), and WCL is entitled to set off any damages suffered by BOC by the difference between BOC's tariff rate damages and the damages BOC would have suffered if it had charged a reasonable rate. Count III asserts that BOC violated 49 U.S.C. § 10741 by not charging, or charging lower, intermediate switching rates to other interline carriers. In Count IV, WCL alleges that BOC and CSX failed to "provide to WCL reasonable, proper and equal facilities for interchange" because CSX has refused to engage in direct interchange of freight cars with WCL in violation of 49 U.S.C. § 10742.

As the March 1, 1994 order stated, WCL will be permitted to reinstate only nonarbitrable claims. See Baltimore and Ohio Chicago Terminal R. Co., 1994 U.S. Dist. LEXIS 2552, 1994 WL 71431 at *3. WCL has waived any arbitrable claims or defenses that could have been presented at the arbitration hearing. Parties "cannot stand by during arbitration, withholding certain arguments, then, upon losing the arbitration, raise such arguments in federal court." National Wrecking Co. v. International Broth. of Teamsters, Local 731, 990 F.2d 957, 960 (7th Cir. 1993); Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993, 998 (5th Cir. 1995).

BOC argues that WCL has waived Count I because it is an arbitrable claim and WCL did not present it at the arbitration hearing. WCL does not dispute that it did not raise Count I at the arbitration hearing. Thus, WCL may file Count I only if it was outside the scope of claims covered by the arbitration clause of the Interchange Agreement. The Interchange Agreement provides that "any irreconcilable dispute arising between

the parties with respect to this Agreement shall be settled through binding arbitration." Therefore, Count I is nonarbitrable only if it does not "arise with respect to" the Interchange Agreement.

Arbitration clauses are to be liberally construed and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). The use of the broad language "arising with respect to" in the arbitration clause of the Interchange Agreement indicates that this clause should not be narrowly construed. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967) (labeling "broad" a clause requiring arbitration of "any controversy or claim arising out of or relating to this Agreement"). A broad arbitration clause does not "limit arbitration to the literal interpretation or performance of the contract, but embrace[s] every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute." American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996). This is an appropriate construction for the arbitration clause of the Interchange Agreement. Keeping in mind the strong federal policy in favor of arbitration and the broad language of this arbitration clause, each of WCL's claims will be examined separately to determine if it has been waived. See id.

A. Count I

Count I seeks a declaratory judgment that the "filed rate doctrine" applies to the parties' dispute. Where it applies, the filed rate doctrine bars common carriers from making private deals that depart from its filed tariff rates. See, e.g., Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97, 59 L. Ed. 853, 35 S. Ct. 494 (1915). The relevant portion of Count I alleges as follows:

> Because the Panel interpreted the interchange agreement as not providing for a direct interchange between WCL and CSXT and because the panel concluded that BOC performed intermediate switching [*18] service with respect to the cars that WCL had delivered to Barr Yard for interchange to CSXT and because the interchange agreement was never filed with the ICC, WCL has contended that BOCT can recover intermediate switching charges on said cars only if BOC brings an action for recovery under its tariff and establishes that it is entitled to recover said charges under its tariff.

In short, Count I alleges that BOC cannot collect switching charges under the unfiled Interchange Agreement because BOC's filed tariff governs.

BOC argues that Count I directly challenges the enforceability of the Interchange Agreement and hence was arbitrable. WCL responds that it agrees with BOC that the Interchange Agreement is an enforceable agreement and that the Interchange Agreement governs all aspects of the parties' relationship as to intermediate switching services performed by BOC, but argues that BOC must nonetheless proceed under its

tariff on file with the ICC to collect switching charges from WCL. WCL further contends that Count I may be properly characterized as arising under the ICC Act and not the Interchange Agreement. Under this reasoning, WCL argues, Count I raises issues separate from the Interchange Agreement and is not an arbitrable claim.

Even assuming that Count I does not challenge the enforceability of the Interchange Agreement as a whole, Count I alleges that the provision of the Interchange Agreement which entitles BOC to collect intermediate switching charges at its standard rates is unenforceable. The effect of a successful outcome on Count I for WCL would render the Award uncollectible absent a second action under BOC's filed tariff. This type of action is directly related to the Interchange Agreement and should have been raised at the arbitration hearing. The fact that Count I implicates issues arising under the ICC Act does not render the claim nonarbitrable. See S+L+H S.p.A. v. Miller-St. Nazianz, Inc., 988 F.2d 1518, 1524 (7th Cir. 1993) ("Simply because Miller has asserted a claim based on the Fair Dealership Law does not mean that the claim does not arise from or relate to the Agreement.").

WCL attempts to excuse its delay in raising the filed rate doctrine by explaining that "there was no reason . . . to assert any claim based on the filed-rate doctrine until after the panel issued their award" because it was only then that WCL's interpretation of the Interchange Agreement was rejected. This argument is without merit. WCL was required to anticipate an adverse decision by the Panel and raise all possible arbitrable defenses. [8] WCL is not entitled try each of its defenses in

separate actions.

Moreover, equitable principles weigh against excusing WCL's failure to raise the filed rate doctrine at the arbitration hearing. [9] Prior to this late stage in the litigation, WCL never asserted that a filed rate supplanted the Interchange Agreement. The first time WCL raised the issue that BOC's filed tariff might apply to this dispute was on July 5, 1996. In fact, WCL has consistently argued the opposite proposition - that the Interchange Agreement, and not the tariff, applied to the [*21] intermediate switching services performed by BOC. For example, WCL expressly denied the applicability of the tariff in its affirmative defense to BOC's original action brought under its tariff. In addition, WCL specifically alleged that it denied the applicability of the tariff in its original countercomplaint. Even when the issue of whether to send this case to arbitration was briefed, WCL took the position that the Interchange Agreement governed the parties' dispute.

Finally, even if WCL were correct that a successful judgment on Count I does not render the Interchange Agreement unenforceable, WCL would not be permitted to file Count I because Count I is futile. Villa v. City of Chicago, 924 F.2d 629 (7th Cir. 1991) ("Leave is inappropriate where there is . . . futility of the amendment"); Glick v. Koenig, 766 F.2d 265, 268-69 (7th Cir. 1985) ("Rule 15(a) do[es] not require courts to indulge in futile gestures."); Universal Mfg. Co. v. Douglas Press, Inc., 770 F. Supp. 434 (N.D. Ill. 1991) (court is justified in denying leave to amend if the proposed amendment could not withstand a motion to dismiss) (citing Foman v. Davis, 371

U.S. 178, 183, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)). In Count I, WCL seeks to apply BOC's tariff rates on file with the ICC. This outcome, however, has already occurred. The Interchange Agreement provided that BOC's "standard intermediate switch" charges applied -- i.e., BOC's filed tariff rates. The Interchange Agreement and BOC's filed tariff were compatible arrangements -- the Interchange Agreement "wrapped around" BOC's filed tariff rate. Enforcing BOC's tariff rates would result in the same judgment against WCL as contained in the Award, because once the Panel found liability under the Interchange Agreement, it applied BOC's tariff rates in calculating damages owed to BOC. Thus, WCL will not be permitted to file Count I.

B. Counts II and III

WCL presented claims based upon 49 U.S.C. § 10701(a), WCL's unreasonable rate claim, and 49 U.S.C. § 10741, WCL's discriminatory rate claim, to the Panel. At a hearing on June 20, 1995, the Panel determined that "all of the issues raised by the parties are arbitrable with the exception of those defenses asserted by Wisconsin Central, Ltd. based upon 49 U.S.C. § 10701(a) and 49 U.S.C. § 10741." WCL therefore has not waived Counts II and III of WCL's amended counterclaim, which assert unreasonable and discriminatory rate claims against BOC.

BOC and WCL concur that if any of the counts in WCL's amended countercomplaint are deemed nonarbitrable and reinstated, then all issues raised in those counts should be referred to the Surface Transportation Board ("STB"), the

successor agency to the ICC, under the doctrine of primary jurisdiction. [10] It is appropriate to refer the discriminatory and unreasonable rate claims to the ICC. See, e.g., Burlington Northern, Inc. v. United States, 459 U.S. 131, 141, 74 L. Ed. 2d 311, 103 S. Ct. 514 (1982); Advance United Expressways, Inc. v. Eastman Kodak Co., 965 F.2d 1347, 1353 (5th Cir. 1992). Counts II and III will be referred to the STB and will be stayed pending consideration by the STB of WCL's claims.

C. Count IV

Count IV, which asserts a claim based on 49 U.S.C. § 10742, was raised in WCL's original countercomplaint. Count IV, brought only against CSX, alleges that CSX agreed to engage in direct interchange of freight cars with WCL at Barr Yard. WCL contends that despite this representation, CSX required WCL to use the services of BOC as an intermediate switching carrier to effect interchange. In addition, WCL asserts that CSX [*25] has used the trackage rights it obtained from BOC to effect direct interchange with other interline carriers or, through its manipulation of BOC, caused BOC to waive all or substantially all of the intermediate switching charges. In those instances where CSX has required interline carriers to use BOC's services, WCL alleges that CSX has absorbed the charges. As a result, WCL argues it is entitled to recover damages from CSX under 49 U.S.C. § 11704.

BOC argues that Count IV represents a "different set of allegations involving a different set of facts [than contained in the original countercomplaint] . . . and must be heard in a

different proceeding." BOC is incorrect, however, in asserting that WCL's amended countercomplaint raises new allegations. To the contrary, the language of the Award demonstrates that the issue of whether WCL was entitled to a determination that a direct interchange occurred between CSX and WCL was within the scope of arbitrable issues and was in fact arbitrated. As the written decision of the Panel states, WCL argued a similar theory in support of its defense:

> WCL's first defense to BOCT's claim for intermediate switching charges is that the interchange agreement between the parties provides for direct interchange between CSXT and WCL at the Barr Yard. As a result, no intermediate switching charges arise since no intermediate switching has taken place.

At the arbitration hearing, WCL raised three theories in support of its contention that no direct interchange existed: (i) the language of the Interchange Agreement establishes that no direct interchange existed; (ii) the intent of the parties as reflected in the correspondence between the parties was to provide for a direct interchange; and (iii) because BOC was a corporate shell -- a mere instrumentality or agent of CSX, rather than a bona fide operating legal entity -- a direct interchange existed between WCL and CSX. The Panel found that WCL's "direct interchange argument is not supported by the evidence." Among other reasons, the Panel found that the language of the Interchange Agreement which stated that cars "shall be delivered in interchange direct to BOCT" supported the conclusion that the parties did not intend to provide for a

direct interchange between CSX and WCL. (emphasis added).

WCL's allegation in Count IV that CSX agreed to engage in direct interchange is nearly identical with its argument to the Panel that correspondence between the parties establishes that a direct interchange existed. To the extent WCL repeats its argument in Count IV, WCL may not relitigate the issue of a direct interchange.

Similarly, the Panel's decision that CSX was not required to engage in direct interchange with WCL, absorb switching charges or require BOC to waive switching charges merely because CSX possessed trackage rights over BOC's tracks is binding on WCL and may not be relitigated. The Panel's determination is supported in the case law. See Burlington Northern R. Co. v. United States, 235 U.S. App. D.C. 186, 731 F.2d 33, 40 (D.C. Cir. 1984) ("It is entirely reasonable and proper for two noncontiguous railroads to interchange traffic through an intermediate switching carrier rather than by direct connection, even though one of the railroads involved has complete ownership of the intermediate carrier.").

Moreover, WCL does not allege facts from which to infer that CSX refused to provide equal "facilities." WCL disputes only that it was required to pay for interchange services, although other carriers were not charged. This claim is indistinguishable from WCL's discrimination claim under § 10741(a), which will be referred to the STB. The purpose of § 10742, however, is to ensure the availability of interchange facilities on an reasonable and equal basis, not to ensure uniform pricing of available facilities:

> In discussing the original section on the Senate floor, Senator Cullom explained that its purpose was "to require railroads to furnish to connecting roads all reasonable and proper facilities for the interchange of traffic that may be necessary for the convenience of the public, and to prevent one road, or a combination of roads, from 'freezing out' a connecting line by refusing to accept traffic from it or deliver traffic to it upon any terms, as has been done." . . . In the present case, there is no allegation that direct interchange facilities are necessary to the public convenience or that the B & O has attempted to freeze out petitioner from interchanging traffic at Chicago. This observation, combined with the fact that petitioner currently has available to it reasonable, proper, and equal facilities for interchanging traffic is dispositive of its charge under section 10742.

Burlington Northern R. Co., 731 F.2d at 40 n.15 (quoting 17 Cong. Rec. 3470, 3472 (1886) (remarks of Sen. Cullom)). Count IV does not allege that a direct interchange was necessary to the public convenience or that WCL was frozen out of facilities. Even if WCL had asserted that it was frozen out of receiving interchange services, this argument would be tantamount to an allegation that CSX breached the Interchange Agreement. Any claim alleging a breach of the Interchange Agreement was, of course, arbitrable.

In sum, Count IV raises arbitrable issues or issues that already have been decided by the Panel, and WCL has waived any additional theories in support of its contention that a direct

interchange existed between CSX and WCL or that CSX's control over BOC was improper. The fact that WCL asserts that CSX has violated 49 U.S.C. § 11742 by failing to acknowledge that a direct interchange existed or should have been recognized does not render the claim nonarbitrable. See S+L+H S.p.A., 988 F.2d at 1524. Count IV will be not be reinstated.

IV. BOC'S MOTION TO CONFIRM AND ENTER JUDGMENT ON THE ARBITRATION AWARD AND WCL'S MOTION TO VACATE OR MODIFY THE AWARD

Since WCL may reinstate Counts II and III, supplemental jurisdiction under 28 U.S.C. § 1367 may be exercised over WCL's motion to vacate or modify the Award and BOC's motion to confirm and enter judgment on the Award. 28 U.S.C. § 1367 provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." The Seventh Circuit has noted that this section "authorizes supplemental jurisdiction coextensive with the 'case or controversy' requirement of Article III." Baer v. First Options of Chicago, Inc., 72 F.3d 1294, 1298 (7th Cir. 1995). "A loose factual connection between the claims is generally sufficient" to support supplemental jurisdiction. Ammerman v. Sween, 54 F.3d 423, 424 (7th Cir. 1995). In this case, WCL's claims seek to recoup damages awarded to BOC under the Award and both WCL's claims and the parties' FAA motions concern BOC's right to collect intermediate switching charges from WCL. The parties' FAA motions are intertwined with WCL's claims. On these

bases, the exercise of supplemental jurisdiction over the parties' FAA motions is proper.

The scope of review of a commercial arbitration award is "grudgingly narrow," Eljer Mfg., Inc. v. Kowin Development Corp., 14 F.3d 1250, 1253 (7th Cir. 1994), and "excruciatingly limited." Ethyl Corp. v. United Steelworkers of America, 768 F.2d 180, 183 (7th Cir. 1985). Sections 10 and 11 of the Federal Arbitration Act set forth the grounds upon which an arbitration award may be modified or vacated. n11 9 U.S.C. ee 10, 11. In addition, an award may be set aside if the arbitrator deliberately disregards what the arbitrator knows to be the law in arriving at the decision. Eljer Mfg. Inc., 14 F.3d at 1254. "Factual or legal errors by arbitrators -- even clear or gross errors -- do not authorize courts to annul awards. . . . Insufficiency of the evidence is not a ground for setting aside an arbitration award under the FAA." Flexible Mfg. Systems Pty. Ltd. v. Super Products Corp., 86 F.3d 96, 100 (7th Cir. 1996) (quoting Gingiss International, Inc. v. Bormet, 58 F.3d 328, 333 (7th Cir. 1995)). Courts may not vacate awards even if convinced that the arbitrator's interpretation of contract was not only wrong, but plainly wrong. Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1504 (7th Cir. 1991).

WCL asserts that a number of errors by the Panel justify vacating or modifying the Award. WCL also asserts that the reasons set forth in its motion to vacate or modify the Award provide a basis for denial of confirmation of the Award. WCL contends that (i) the Panel acted improperly in "arbitrarily disre garding" the testimony of Thomas Schmidt; (ii) the Panel

"manifestly disregarded Illinois law" as to BOC's implied duty of good faith; (iii) the Panel did not apply unambiguous language of the Interchange Agreement; and (iv) charges for cars handled under other agreements between the parties should have been excluded from the Award.

The Panel's interpretation of paragraph 2(a)(i) of the Interchange Agreement is central to WCL's motion to vacate the Award. Paragraph 2(a)(i) states as follows:

> Cars destined to or routed via BOCT points and former B&O and C&O points shall be delivered in interchange direct to BOCT on Barr Yard tracks designated from time to time by BOCT's Barr Yard operating officer in charge. Standard BOCT intermediate switch charges shall apply on such cars, routed via or destined to former B&O and C&O points, provided however, that said charges will be waived should WCL pre-block certain of such cars in accordance with blocking schedules of BOCT as may be released or revised from time to time.

In its written decision, the Panel interpreted paragraph 2(a)(i) to require WCL to pay switching charges on all cars unless BOC issued blocking schedules and WCL blocked cars in accordance with those schedules. "Blocking" is the organization of cars in a train by some characteristic of the cars. Blocking tends to reduce the amount of switching and classification work that a receiving carrier must perform once it receives the cars. Most commonly, cars are blocked when they are grouped together by their destination. A blocking schedule instructs a

delivering carrier how to block the cars to be delivered. The Panel found that BOC never issued blocking schedules and, as a result, WCL was required to pay all intermediate switching charges.

A. Schmidt's Testimony

WCL contends that the Award should be vacated because the Panel exceeded its powers by arbitrarily disregarding the undisputed testimony of Thomas Schmidt, the principal negotiator of the Interchange Agreement for BOC, in interpreting paragraph 2(a)(i) of the Interchange Agreement. At the arbitration hearing, WCL argued that paragraph 2(a)(i) released WCL from any obligation to pay intermediate switching charges unless BOC issued blocking schedules and WCL failed to block the cars in accordance with those schedules. The Panel received extrinsic or parol evidence, WCL argues, because it concluded that paragraph 2(a)(i) was ambiguous. However, the Panel stated no such finding or conclusion, and the Panel's consideration of parol evidence was not the equivalent of a finding of ambiguity. See Home Ins. Co. v. Chicago and Northwestern Transp. Co., 56 F.3d 763, 768 (7th Cir. 1995) ("In determining whether an ambiguity exists . . . the trial court may consider parol and extrinsic evidence."). The parol evidence rule is not a rule of evidence, but a rule of substantive contract law. Land of Lincoln Savings and Loan v. Michigan Ave. Nat. Bank of Chicago, 103 Ill. App. 3d 1095, 432 N.E.2d 378, 383, 59 Ill. Dec. 794 (3d Dist. 1982). The parol evidence rule was not referred to by the Panel. Rather, the Panel considered parol or extrinsic evidence because the contract was not contained "in one fully integrated writing."

The Panel found paragraph 2(a)(i) to be clear in providing BOC the option but not a duty to issue blocking schedules. The plain meaning of the paragraph was not overcome by contrary testimony by Burkhardt because of what the Panel found to be his inconsistent editing of the paragraph after a telephone conversation with a CSX representative -- a conversation the CSX representative did not recall -- agreeing with Burkhardt's interpretation that issuing blocking schedules was required. On this record the Panel's finding and conclusion is certainly possible and supported by evidence.

WCL's argument does not provide a basis upon which to vacate the Award. WCL merely asserts that its interpretation of the Interchange Agreement should be substituted for the interpretation given to the provision by the Panel. The "test for vacating an award under Section 10(a)(4) of the FAA is whether the arbitrator exceeded the powers delegated to him by the parties." Eljer Mfg., Inc., 14 F.3d at 1257. The Panel did not exceed its powers in interpreting paragraph 2(a)(1) because the arbitration clause in the Interchange Agreement delegated authority to the Panel to resolve disputes arising from the Interchange Agreement. Thus, the Panel was within its authority when it interpreted the provision.

Even if WCL is correct and the testimony of Schmidt or Burkhardt supports WCL's interpretation, the Panel's decision would not be overturned on this basis because the fact that arbitrators reject a valid, or even a dispositive legal defense, does not provide grounds for vacating an award unless the arbitrators deliberately disregarded known law. Flexible Mfg. Systems Pty., Ltd., 86 F.3d at 100. Indeed, revisiting the evidence

of the arbitration hearing would be conducting the type of "searching review" of the Panel decision that the Seventh Circuit has cautioned would transform arbitration from "a commercially useful alternative method of dispute resolution into a burdensome additional step on the march through the court system." Id.

B. BOC's Implied Duty of Good Faith and Fair Dealing

WCL next argues that the Award should be vacated because the Panel "manifestly disregarded the law" in determining that the duty of good faith did not apply to BOC's discretion in issuing blocking schedules. To vacate an arbitration award for manifest disregard of the law, "there must be something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the law." Health Services Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992). WCL contends that under Illinois law, BOC had an implied duty of good faith in deciding whether to issue blocking instructions or simply collect intermediate switching charges because this decision "was contingent upon a condition that was within [BOC's] control." WCL asserts that the Award must be vacated because the Panel deliberately disregarded the law by refusing to impose a duty of good faith with respect to BOC's conduct and find a breach of this duty.

The written decision of the Panel, however, demonstrates that the Panel did not "deliberately disregard" the application of the implied duty of good faith and fair dealing to BOC's conduct. Rather, the Panel considered the argument that a duty of good faith and fair dealing applied to BOC's conduct,

and reasoned that "part of the answer appears to be that the implied covenant of good faith and fair dealing is difficult to apply to a case where both parties expressly retained discretion as to whether performance would occur" -- i.e., even if BOC issued blocking instructions, WCL had discretion as to whether to perform the blocking service or pay intermediate switching charges. Nevertheless, the Panel proceeded to apply the duty of good faith to BOC's decision not to issue blocking schedules. The Panel found that "a decision to collect intermediate switch charges rather than issue blocking instructions does not rise to the level of bad faith performance of the agreement." The Panel also found that the underlying reason for granting BOC discretion in this regard was to allow BOC to determine if sufficient benefits would be obtained from issuing blocking instructions. Thus, WCL is incorrect in stating that the Panel refused to apply an implied duty of good faith to BOC's conduct. Instead, the Panel expressly applied the duty of good faith to BOC's decision not to issue blocking instructions and determined that BOC did not act (or refuse to act) in bad faith.

C. Per Car Rate of $ 105

WCL seeks to modify the Award by recalculating damages on the basis of the switching charge rates in effect at the time the Interchange Agreement was entered into by the parties -- $ 75 per loaded car and $ 38 per empty car. In calculating damages to be assessed against WCL, the Panel utilized a switching charge of $ 105 per car because effective May 1, 1988, BOC had increased its switching charges as a result of CSX's decision to consolidate all interchange operations at Barr Yard. WCL contends that BOC was prohibited from raising its

rates because paragraph 8 of the Interchange Agreement provided as follows:

> The terms and provisions of this Agreement may require extensive modification [in the event BOC and CSX re-arrange their interchanges at Chicago], and WCL agrees to be bound by such arrangements . . . provided such revised arrangement does not increase WCL's costs or unreasonably delay user's traffic. (emphasis added).

contends that the Panel should not have used the higher rate in computing damages because the intermediate switching charge fell within the definition of "costs," as defined by the Interchange Agreement. Therefore, WCL argues, switching rates could not be increased during the term of the Interchange Agreement. In using the higher rate, WCL asserts that the Panel exceeded their powers by disregarding an "unambiguous" term of the Interchange Agreement.

Courts have held that "where the award disregards and irrationally contradicts the express terms of a contract," the arbitrators have exceeded their powers. First Commercial Financial Group, Inc. v. Baghdoian, 812 F. Supp. 837, 839 (N.D. Ill. 1993). The test for this inquiry is whether the Panel interpreted the contract. Dreis & Krump Mfg. Co. v. International Ass'n of Machinists and Aerospace Workers Dist. No. 8, 802 F.2d 247, 253 (7th Cir. 1986). As long as the Panel interpreted the agreement in making its award, the award must be affirmed, even if the agreement was erroneously interpreted. Hill v. Norfolk and

Western Ry. Co., 814 F.2d 1192, 1195 (7th Cir. 1987). Only if the Panel ignored, rather than misinterpreted, the agreement has the Panel exceeded its powers under 9 U.S.C. § 10(d). Chicago and Northwestern Transp. Co. v. United Transp. Union, 905 F.2d 171, 173 (7th Cir. 1990).

The written decision of the Panel refutes WCL's argument that the Panel "ignored" paragraph 8 of the Interchange Agreement. Instead, the Panel specifically interpreted the term "costs" and addressed WCL's argument that intermediate switching charges could not be increased as a result of this provision:

> Based on the language selected by Mr. Burkhardt, which refers to "cost" and "user," Section 8 appears to pertain to the types of operating costs associated with another agreement between the parties concerning trackage rights. If the parties had intended to place a limit on intermediate switch charges, which are not otherwise referred to as "costs," they would have specifically referred to those charges as they did in Section 2.

The record demonstrates that the meaning of the term "costs" was fully addressed and argued in the post-hearing briefs. The Panel then interpreted "costs" to exclude intermediate switching charges. WCL merely contends that the term "costs" should have been interpreted more expansively by the Panel. Thus, WCL's argument must fail. [12]

D. Damages Calculation

WCL next argues that the Panel erroneously included $ 1,726,935 in intermediate switching charges and $ 244,101 in car hire reclaim charges on cars covered under other contracts between the parties. WCL asserts, and BOC concurs, that no switching charges could be incurred for cars handled under other contracts. The parties, however, presented conflicting calculations of excludable charges at the arbitration hearing. In addition, the parties did not agree whether shipments covered under other contracts were excused from car hire reclaim charges. Again, these arguments were fully argued in briefs submitted to the Panel. The Panel decided to accept BOC's calculation of charges excludable from the damage amount. The Award cannot be modified to now accept WCL's calculation. Thus, WCL's motion to modify the Award will be denied and the Award will be confirmed in the amount of $ 17,276,290.30.

E. Computation of Charges and Interest for Period from September 1, 1995 through May 31, 1996

WCL asserts that judgment should not be entered on the intermediate switching charges owed to BOC for the period from September 1, 1995 through May 31, 1996. In the Award, the Panel determined that BOC was entitled to recover intermediate switching charges on cars that WCL had delivered to Barr Yard for interchange to CSX during this period. The Panel, however, did not reach a conclusion as to the exact amount owed to BOC. In connection with its motion, BOC has submitted the affidavit of Allison Brown, Assistant Controller - Revenue Reporting for CSX, in support of its calculation that

switching charges and interest due for this period amount to $ 2,702,536.90. CSX performs the billing and collection services for BOC.

WCL submitted the affidavit of Michael A. Hohlman, WCL's Director of Revenue, Customer and Car Hire Accounting. Hohlman's affidavit asserts that Brown's affidavit improperly includes switching charges on cars that were handled under contracts that preclude any switching charges. In addition, Hohlman testified that Brown miscalculated prejudgment interest on the switching charges. Under Brown's calculation, interest on charges began accruing at the end of the month. WCL asserts that interest did not accrue until the switching charges became due, on the twentieth day of the following month. In light of these alleged errors in Brown's affidavit, WCL requests that resolution of these issues be remanded back to the Panel. In the alternative, WCL asks that the Award be modified or corrected under Section 11(c) of the FAA.

BOC agrees that any contested charges should be resolved by the Panel, but argues that even under WCL's calculation $ 1,764,840.00 in charges and $ 119,360.14 in interest are uncontested and should be added to the Award. Since the Panel found that WCL was liable for charges from September 1, 1995 through May 31, 1996 and WCL does not contest $ 1,884,200.14 of the charges, this amount will be added to the Award. The determination as to whether WCL must pay the contested portion of these charges, $ 779,205.00, will be remanded to the Panel.

F. Supplemental Judgment

In its motion to confirm and enter judgment on the Award, BOC requests that jurisdiction be retained to enter a supplemental judgment on the Award for (i) all additional charges incurred by WCL under the Interchange Agreement through August 4, 1996, the date the Interchange Agreement was terminated, and (ii) all additional interest accrued on amounts owed by WCL, until paid in full. The determination of the amount of these charges is most appropriately made by the Panel, especially in view of the fact that a determination as to which services were performed under other transportation contracts will be necessitated. Therefore, this issue will be remanded to the Panel for a determination of these amounts.

G. BOC's Motion to Conditionally Waive Part of Claim.

BOC moves for leave to file a supplemental damages affidavit, simply issues and conditionally waive part of its claim. BOC offers to conditionally waive the disputed portion of the switching charges from September 1, 1995 through July 31, 1996 (Part IVE above) and all charges from August 1, 1996 through August 4, 1996 (Part IVF above). BOC conditions its waiver on the confirmation of the Award; if the Award cannot be confirmed for reasons other than the conditionally waived switching charges, then BOC reserves the right to claim these charges. WCL objects to BOC's motion on the grounds that BOC's supplemental damages affidavit again miscalculates the interest due to BOC, most notably by accruing interest at the end of each service month, rather than accruing interest on the date the bill was sent to WCL. In view of the numerous and possibly meritorious objections made by WCL to the supplemental damages affidavit, disputes still exist that should be

resolved by the Panel, as set forth in Part IVE and Part IVF above. Presumably, BOC revokes its offer to waive a portion of its claim in light of the remand to the Panel and BOC's motion will be denied.

V. STAY OF ENTRY OF JUDGMENT ON THE AWARD[13]

WCL moves to stay judgment on the Award in the event it is confirmed. Since several issues have been remanded to the Panel for calculation, judgment will not yet be entered on the Award. Thus, WCL's motion is premature and will be denied without prejudice.

IT IS THEREFORE ORDERED that:

(1) The motion of Baltimore and Ohio Chicago Terminal Railroad Company and CSX Transportation, Inc. to file a surreply to Wisconsin Central, Ltd.'s motion to reinstate its counterclaims [55-1] is granted.

(2) The Clerk of the Court is directed to enter a judgment as follows:

(a) The motion of Baltimore and Ohio Chicago Terminal Railroad Company and CSX Transportation, Inc. to confirm and enter judgment on the arbitration award [39-1,2] is granted in part and denied in part.

(b) Wisconsin Central, Ltd.'s motion to vacate or modify the arbitration award [41-1,2] is denied.

(c) The arbitration award is confirmed in the amount of $ 19,160,490.44.

(d) The determination as to the contested $ 779,205.00 in switching charges owed to Baltimore and Ohio Chicago Terminal Railroad Company for the period from September 1, 1995 through August 4, 1996 is remanded to the arbitration panel. In addition, the determination as to the amount of interest owed to Baltimore and Ohio Chicago Terminal Railroad Company is remanded to the Panel.

(e) Jurisdiction will be retained for the purpose of confirming and entering any supplemental amounts awarded by the arbitration panel.

(f) Wisconsin Central, Ltd.'s motion for a stay of the judgment is denied as moot at the present time.

(g) Wisconsin Central, Ltd.'s motion to reinstate its counterclaims [37-1] is granted in part and denied in part. Wisconsin Central, Ltd.'s motion is denied with prejudice as to Counts I and IV and granted as to Counts II and III.

(h) Counts II and III of WCL's amended counterclaim are referred to the Surface Transportation Board. Counts II and III are stayed pending consideration by the Surface Transportation Board.

(i) Baltimore and Ohio Chicago Terminal Railroad Company and CSX Transportation, Inc.'s motion to file supplemental damages affidavit, simplify issues and conditionally waive part of its claim [58-1] is denied.

(3) The case is dismissed from this court's docket without prejudice and with leave to timely move to reinstate to confirm or vacate any subsequent arbitration order or order of the Surface Transportation Board.

ENTER:

UNITED STATES DISTRICT JUDGE

DATED: JANUARY 29, 1997

----------Footnotes----------

n1 The motion of BOC to file a surreply to WCL's motion to reinstate its counterclaims will be granted.

n2 "Car hire" is a rental charge that each rail carrier must pay to the owner of a car in the carrier's custody. Under the AAR Car Hire Rules, a carrier performing intermediate switching service is entitled to recover from the delivering interline carrier an intermediate car hire reclaim, which is designed to reimburse it for any car hire expense it incurs while handling the car.

n3 The genesis of the Interchange Agreement was an exchange in July 1987, when E. A. Burkhardt, president of WCL, contacted a CSX representative regarding a proposed agreement between WCL, BOC and CSX. A draft agreement was prepared by John Booth of CSX and he submitted the agreement to Burkhardt. The draft was subsequently revised by Burkhardt.

n4 The parties also agree that the Interchange Agreement incorporates a letter sent by Burkhardt to A. P. Fish of CSX.

n5 The arbitration hearing was extensive. Twenty-one witnesses testified and more than 400 exhibits were submitted. The transcript of the hearing is 3,186 pages. In addition, the parties submitted post-hearing memoranda to the Panel.

n6 The Interchange Agreement was formally terminated on August 4, 1996.

n7 WCL also contends that jurisdiction over this case necessarily ended because the parties' claims were dismissed in the March 1, 1994 order. The March 1, 1994 order granted BOC's motion for a stay of the case, effected through a dismissal of the claims without prejudice and with leave to reinstate. WCL argues that the order constituted a final order and thus jurisdiction terminated at that point. WCL is incorrect in its characterization of the order. The procedural method employed by the order differs from a stay only in that dismissing the action with leave to reinstate puts the onus on the litigants to act in a timely manner if further disputes remain to be resolved.

n8 It appears that WCL was aware of the danger that claims not raised might be waived. It attempted to have claims arising under 49 U.S.C. § 10701(a) and 49 U.S.C. § 10741 heard by the Panel, although the Panel ultimately ruled that these claims were nonarbitrable.

n9 BOC also argues that WCL should not be permitted to file Count I because WCL is not technically seeking to reinstate one of its dismissed claims. BOC correctly asserts that WCL did not plead Count I in its original countercomplaint. WCL's failure to assert the applicability of the tariff in its original countercomplaint is not dispositive, however, because WCL would have been permitted to amend its pleadings to assert the substance of Count I as an alternative defense or counterclaim to the enforcement of the Interchange Agreement. See Fed. R. Civ. P. 15(e).

n10 Although WCL may not maintain an action that seeks enforcement of the filed rate doctrine, WCL is not foreclosed from arguing that damages under the Award emanate from BOC's tariff in order to advance WCL's ICC claims.

n11 Section 10(a) of the FAA provides:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
> (1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

n12 The question of whether or not the $ 105 rate, which on the surface appears to be high, is unreasonable is still open for consideration before the Surface Transportation Board.

n13 WCL also requests that consideration of BOC's motion to confirm and enter judgment be stayed until after Count I of its amended counterclaim is decided. Since leave to file Count I is denied, no basis exists upon which to stay consideration of BOC's motion.

Appendix D

No. 97-3484

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY,
Plaintiff-Appellee,

v.

WISCONSIN CENTRAL LIMITED,
Defendant-Appellant.

October 21, 1998, Decided

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 93 C 3519. William T. Hart, Judge.

JUDGES: Before Hon. Richard A. Posner, Chief Judge, Hon. Walter J. Cummings, Circuit Judge, Hon. William J. Bauer, Circuit Judge.

OPINION: ORDER

On September 8, 1998, defendant-appellant filed a petition for rehearing with suggestion for rehearing en banc and on September 30, 1998, plaintiff-appellee filed an answer. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

Appendix E

49 U.S.C. § 10713 (1993). Contracts

(a) One or more rail carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions. Such a rail carrier may not enter into a contract with purchasers of rail service except as provided in this section.

(b)(1) Each contract entered into under this section shall be filed with the Commission, together with a summary of the contract containing such nonconfidential information as the Commission prescribes, The Commission shall publish special tariff rules for such contracts in order to assure that the essential terms of the contract are available to the general public in tariff format.

(2)(A) The essential terms of any contract for the transportation of agricultural commodities to be made available to the general public in tariff format under this subsection shall include, but shall not be limited to (i) the identity of the shipper party to the contract; (ii) the specific origins, transit points and other shipper facilities subject to the contract, and destinations served under such contract; (iii) the duration of the contract, including provisions for optional extension; (iv) the actual volume requirements, if any; (v) whether any transportation service has begun under a contract before the date such contract is filed with or approved by the Commission, and (vi) the date on which the contract became applicable to the transportation services provided under the contract. The Commission shall interpret this subsection to provide for liberal discovery to shippers seeking remedies under subsection (d)(2)(B) of this section.

(B) Any amendment, supplement, or change to any term or provision of any contract described in subparagraph (A), including extensions of such contract, changes of origin, transit points, affected shipper facilities, destination points, or negotiated economic terms, shall be deemed to be a separate and new contract for the purposes of this subsection. Such amendments. supplements, or changes shall be filed separately with the Commission as provided in paragraph (1)

(C) Within 60 days after the date of the enactment of the Conrail Privatization Act, the Commission shall issue regulations which require that essential terms of contracts described in subparagraph (A) shall be made available to the general public in tariff format as provided in this paragraph.

(D) The railroad contract rate advisory service established pursuant to subsection (m) of this section shall assess the impact on competition among agricultural shippers of variations between contract rates for various shipments and the published single car rates, and shall submit a report to the Congress not later than 120 days after the date of the enactment of the Conrail Privatization Act.

(c) A contract filed under this section shall be approved by the Commission, as provided in subsection (e) of this section, unless the Commission determines in a proceeding under subsection (d) of this section that such contract is in violation of this section.

(d)(1) No later than 30 days after the date of filing of a contract under this section, the Commission may, on its own initiative or on complaint, begin a proceeding to review such contract on the grounds described in this subsection.

(2)(A) In the case of a contract other than a contract for the transportation of agricultural commodities (including forest products and paper), a complaint may be filed-

(i) by a shipper only on the grounds that such shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting carrier or carriers to meet their common carrier obligations to the complainant under section 11101 of this title; or

(ii) by a port only on the grounds that such port individually will be harmed because the proposed contract will result in unreasonable discrimination against such port.

(B) In the case of a contract for the transportation of agricultural commodities (including forest products and paper), in addition to the grounds for a complaint described in subparagraph (A) of this paragraph. a complaint may be filed by a shipper on the grounds that such shipper individually will be harmed because:

(i) the rail carrier has unreasonably discriminated by refusing to enter into a contract with such shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or

(ii) the proposed contract constitutes a destructive competitive practice under this subtitle.

In making a determination under clause (ii) of this subparagraph, the Commission shall consider the difference between contract rates and published single car rates.

(C) For purposes of this paragraph, the term "unreasonable discrimination" has the same meaning as such term has under section 10741 of this title.

(3)(A) Within 30 days after the date a proceeding is commenced under paragraph (1) of this subsection, or within such shorter time period after such date as the Commission may establish, the Commission shall determine whether the contract that is the subject of such proceeding is in violation of this section.

(B) If the Commission determines, on the basis of a complaint filed under paragraph (2)(B)(i) of this subsection, that the grounds for a complaint described in such paragraph have been established with respect to a carrier, the Commission shall, subject to the provisions of this section, order such carrier to provide rates and service substantially similar to the contract at issue with such differentials in terms and conditions as are justified by the evidence.

(e) Approval of a contract filed under this section shall be effective-

> (1) on the date the Commission expressly approves such contract, but in no event before the end of the 30-day period beginning on the date such contract is filed or after the end of the 60-day period beginning on such date: or
>
> (2) if the Commission has not disapproved such con tract by the end of the 60-day period beginning on the date such contract is filed, at the end of such 60-day period.

(f) The Commission may limit the right of a rail carrier to enter into future contracts under this section following a

determination that additional contracts would impair the ability of the rail carrier to fulfill its common carrier obligations under section 11101 of this title.

(g) The Commission may not require a rail carrier to violate the terms of a contract that has been approved under this section, except to the extent necessary to comply with section 11128 of this title.

(h) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

(i)(1) A contract that is approved by the Commission under this section, and transportation under such contract, shall not be subject to this subtitle, and may not be subsequently challenged before the Commission or in any court on the grounds that such contract violates a provision of this subtitle.

(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties other. wise agree.

(j) The provisions of this section shall not affect the status of any lawful contract between a rail carrier and one or more purchasers of rail service that is in effect on the effective date of the Staggers Rail Act of 1980. Any such contract shall hereafter have the same force and effect as if it had been entered into in accordance with the provisions of this section. Nothing in this section shall affect the rights of the parties to challenge the existence of such a contract.

(k)(1) Any rail carrier may, in accordance with the terms of this section, enter into contracts for the transportation of agricultural commodities (including forest products, but not including wood pulp, wood chips. pulpwood or paper) involving the utilization of carrier owned or leased equipment not in excess of 40 percent of the capacity of such carrier's owned or leased equipment by major car type (plain boxcars, covered hopper cars, gondolas and open top hoppers, coal cars, bulkhead flatcars, pulpwood rackcars, and flatbed equipment, including TOFC/COFC). except that in the case of a proposed contract between a class I carrier and a shipper originating an average of 1,000 cars or more per year during the prior 3-year period by major car type on a particular carrier, not more than 40 percent of carrier owned or leased equipment utilized on the average during the prior 3-year period may be used for such contract without prior authorization by the Commission.

(2) The Commission may. on request of a rail carrier or other party or on its own initiative, grant such relief from the limitations of paragraph (1) of this subsection as the Commission considers appropriate, if it appears that additional equipment may be made available without impairing the rail carrier's ability to meet its common carrier obligations under section 11101 of this title.

(l) Service under a contract approved under this section shall be deemed to be a separate and distinct class of service, and the equipment used in the fulfillment of such a contract shall not be subject to car service decisions under section 11123 of this title.

(m) The Commission shall establish a railroad contract rate advisory service. The advisory service shall-

(1) compile and disseminate to interested parties nonconfidential summaries of the provisions of individual contract information relating to the provisions of contracts entered into under this section with regard to various goods, items, and commodities covered by such contracts;

(2) provide the Commission and interested parties with advice regarding contracts; and

(3) assess the impact on competition among shippers of variations between contract rates for various shipments and the published single car rates, and submit a report on such impact to the Congress not later than 90 days after the effective date of the Staggers Rail Act of 1980.

49 U.S.C. § 10761 (1993). Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. that carrier may not charge or receive a different compensation for that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not be charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transporation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(c) This section shall not apply to expenses authorized under section 10751 of this title.